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No. 22,708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC., ET AL.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLANT

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

JOHN C. ELDRIDGE,
DANIEL JOSEPH,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

I N D E X

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JURISDICTIONAL STATEMENT

This action was brought by the United States to foreclose a mortgage insured under Section 608 of the National Housing Act, 12 U.S.C. 1743 and assigned to the United States by the original mortgagee after the mortgagor had defaulted (R. 23).[1/] The district court entered a judgment and decree of foreclosure

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1/ "R." references are to Volume I of the Transcript of Record in this Court, containing pleadings, orders and other documents. "Tr." references are to the reporter's transcript of the hearing in the district court.

on November 3, 1967, which judgment imposed upon the United States as mortgagee, a period for redemption to run after the foreclosure sale pursuant to the state law of Idaho (R. 71). The United States purchased the property at the foreclosure sale, which was held on December 12, 1967, and confirmed on December 29, 1967 (R. 74). Notice of appeal was filed on December 29, 1967. This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. The federal mortgage insurance program.

The United States has since 1934 engaged in a vast nationwide program of insuring mortgages under the various titles of the National Housing Act, 12 U.S.C. 1701. The particular mortgage insurance with which we are here concerned was issued under Title VI of the Act, 12 U.S.C. 1736-1746(a), which was designed "to assist in relieving the acute shortage of housing accommodations available to veterans of World War II at prices within their reasonable ability to pay * * * ." 12 U.S.C. 1738(a). Under this title of the Act, and the regulations promulgated pursuant to the authority conferred by Section 607 (12 U.S.C. 1742), [2/] the Federal Housing Administration is authorized to insure mortgages which meet all of the statutory and regulatory prerequisites.

2/ The 1947 Supplement to the Code of Federal Regulations contains the regulations for Title VI in force at the time the mortgage in the instant case was executed and insured, November 30, 1949 (R. 15). Since they thus govern the mortgage insurance transaction in this case, these regulations will be cited throughout.

The mortgage insurance in the instant case was obtained pursuant to Section 608 of the Act, 12 U.S.C. 1743, which authorized such insurance primarily on large, multi-family dwellings. 3/ The detailed procedure for obtaining such insurance is spelled out by the statute and the regulations: First, the mortgagee (who must receive prior, formal approval by the FHA) must apply for mortgage insurance on the standard forms prescribed by the FHA, giving information required by the FHA respecting the project. 4/ Upon approval of this application, the FHA issues a commitment of insurance, setting out the terms and conditions under which the mortgage will be insured. 5/ If the transaction then meets all the eligibility tests established by the FHA with respect to the mortgagor, with respect to the mortgaged property, and with respect to the mortgagor's title therein, and if the mortgage agreement is executed on an FHA form containing all of the required terms and conditions, the mortgage is accepted for insurance. 6/

3/ Specifically, Section 603(b), 12 U.S.C. 1738(b), authorizes mortgage insurance for residential dwellings to be occupied by up to four families. Section 608 confers similar authority for mortgages "[i]n addition to [those] insured under section [603]." Section 608(a), 12 U.S.C. 1743(a).

4/ 24 C.F.R. §§ 580.1-580.7 (1947 Supp.).

5/ 24 C.F.R. § 580.8 (1947 Supp.).

6/ 12 U.S.C. 1743(b); 24 C.F.R. §§ 580.10-580.37 (1947 Supp.).

In the event of a default by the mortgagor, the mortgagee may receive the benefits of the insuring agreement either by assigning the mortgage to the FHA or by obtaining title to the property (by foreclosure or otherwise) and conveying it to the FHA. 7/ If the mortgagee elects to assign the mortgage, the Federal Housing Commissioner is authorized to "institute proceeding for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion." 8/ In addition, in order to protect the Housing Fund, the Commissioner is authorized to become the purchaser of the property at a foreclosure sale. 9/

2. The facts of this case.

On November 30, 1949, Stadium Apartments, Inc., borrowed $130,000 from the Prudential Insurance Company for the purpose of building an apartment house in Caldwell, Idaho. The note and mortgage were executed on FHA forms (R. 8-16).

The mortgage form contained the following language: "The Mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws." (R. 4).

7/ 12 U.S.C. 1743(c).

8/ 12 U.S.C. 1713(k), incorporated by reference into Title VI by 12 U.S.C. 1743(f).

9/ Ibid.

The FHA, on December 7, 1950, endorsed the loan for insurance pursuant to Section 608 of the National Housing Act, 12 U.S.C. 1743, in the manner outlined above (R. 10).

In 1958, the note and mortgage were modified in details not presently relevant. The modification was approved by the Federal Housing Commissioner (R. 17-21).

Stadium Apartments defaulted on the note by failing to pay the installments due on and after December 1, 1966 (R. 68). Because of this default, and exercising its rights under Section 608(c) of the Act, 12 U.S.C. 1743(c), Prudential assigned the note and mortgage to the Secretary of Housing and Urban Development. 10/

The United States filed the complaint in the present action on August 14, 1967, seeking (1) a judgment for $88,492.30 principal due and owing, plus accrued interest and sums advanced for taxes and costs; (2) a judgment of foreclosure and sale of the property; (3) a deficiency judgment for the amount of the debt unsatisfied by the foreclosure sale price; and (4) the appointment of a receiver (R. 3-7). The district court appointed a receiver on September 1, 1967 (R. 33-36). An amended complaint was filed on September 5, 1967 (R. 37-41).

10/ By P. L. 90-19, § 1(a)(3), 81 Stat. 17, the Secretary succeeded to the duties of the Federal Housing Commissioner under the Act.

Because none of the defendants appeared either in person or by counsel, on September 26, 1967, the United States requested, and the clerk of the district court entered, default against the defendants Stadium Apartments, Inc., St. Luke's Hospital and Nurses Training School, Ltd., China B. Fordice, and Paul Ernst, d/b/a Ernst Fuel Company (R. 65).

On October 12, 1967, the district court held a hearing at which he ordered that the United States generally have the relief requested, including judgment for a total of $93,804.97. During the October 12th hearing, the United States requested the court to frame the foreclosure decree so that there would be no period following sale during which the mortgagor could redeem. The district court judge rejected this request, in the following terms (Tr. 23-24):

> THE COURT: Mr. Suiter, I seriously doubt that Prudential could foreclose a man from a redemption period under the laws of the State of Idaho. I don't see how the government is in any better position than Prudential would be. I doubt if the laws of the State of Idaho would permit Prudential to foreclose this mortgage and foreclose a man from redemption. This happens to be a corporation, but it is made with the idea it could be an individual. I don't see how the government is in any better position than Prudential. You are foreclosing so far as this Court is concerned under the laws of the State of Idaho. If you can show me any law that this is permitted, I would permit this in the decree. Otherwise, I will not. I think that you are bound by the law of the State of Idaho, as we often have discussed, and I don't intend to change it. I don't think the law of the State of Idaho so provides or permits it.

MR. SUITER: Well, on behalf of the government I would respectfully urge that State law does not apply in this proceedings.

THE COURT: We have had that argument before, but I can't agree with you and I am sorry I don't agree. So the decree will have to provide for a period of redemption. I don't agree with you, as you well know. Now I am going to deny your request.

On November 3, 1967, the district court filed Findings of Fact and Conclusions of Law (R. 66-69), and a Judgment and Decree of Foreclosure (R. 70-73). The decree generally gave the relief requested by the United States. However, it also provided that, after the foreclosure sale, the Marshal would execute a deed to the purchaser only "after the time allowed by law for redemption has expired" (R. 71). 11/ The decree also stated that the defendants and all other persons claiming any interest in the mortgaged land would be foreclosed from the equity of redemption only "from and after the delivery of said Marshal's deed" (R. 72, par. 4).

On December 12, 1967, the Marshal's sale was held. The only bidder was the United States, which purchased the property for $55,100.00 (R. 82).

11/ Because there is no relevant post-sale-redemption period under federal law (Madison Properties, Inc. v. United States, 375 F. 2d 740, 741 (C.A. 9)), the reference in the decree to "the time allowed by law for redemption" was obviously to the state law of Idaho, which provides for a one-year redemption period. This is made clear by the district court's statement at the hearing (Tr. 23-24), which we have quoted above.

2 Idaho Code 11-402, which provides for post-foreclosure-sale redemption, was amended in 1967 to limit redemption periods to six months for tracts of less than 20 acres. However, the amendment specifically does not apply to mortgages made before its effective date. Idaho S.L. 1967, ch. 293, § 3.

ARGUMENT

As we demonstrate below, the reference in the decree to Idaho law as controlling is erroneous; the law governing this federal mortgage is federal rather than state law. We argue next that while under some circumstances a court applying federal law to the interpretation of a federal contract may use or adopt state law, it may only do so where no federal policy would be impaired, and its use in the present case has impaired the federal policies of uniform administration of the nationwide mortgage insurance program, protection of the federal treasury, and promotion of the security of federal investments.

I

THE PARAMOUNT FEDERAL INTEREST IN THE INTEGRITY OF THE NATIONWIDE MORTGAGE INSURANCE PROGRAM COMPELS INITIAL REFERENCE TO FEDERAL LAW.

It is by now well settled that Congress has by the Rules of Decision Act, 28 U.S.C. 1652, provided for the application of federal law to questions of federal rights and liabilities arising from large-scale federal programs and transactions. 12/ The Supreme Court has held that one of the main purposes of that Act "was to avoid the introduction of disparities, confusions and

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12/ 28 U.S.C. 1652 provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. [Emphasis supplied.]

conflicts which would follow if the Government's general authority were subject to local controls" through application of state law. United States v. Allegheny County, 322 U.S. 174, 183.

In a long line of decisions, [13/] the Supreme Court has made it clear that the paramount federal interest in matters arising out of nationwide government programs and vast federal transactions compels the application of federal law. In United States v. Shimer, 367 U.S. 374, the Court reaffirmed this position in holding that federal rather than state law must be applied to settle the obligations of the Veterans' Administration after default under mortgages which it had guaranteed. Similarly, federal rather than state law has been applied to ascertain the liability of the maker of accommodation paper to a federal corporation insuring the holder's deposits (D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447); to decide the extent of the obligation of the guarantor of a forged endorsement on a check drawn by the United States (Clearfield Trust Co. v. United States, 318 U.S. 363); to determine whether particular machinery was the property of the United States or its private contractor for purposes of imposing state property taxes (United States v. Allegheny County, 322 U.S. 174); to the interpretation of a lease to which an agency

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13/ E.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 366; United States v. Allegheny County, 322 U.S. 174, 181-183; United States v. Standard Oil Co., 332 U.S. 301, 306.

of the United States was a party (United States v. 93.970 Acres, 360 U.S. 328); and, most recently, to fix the ownership of United States savings bonds after the death of one of the co-owners (Free v. Bland, 369 U.S. 663).

This Court has consistently applied these principles in holding that federal rather than state law controls the Government's rights under mortgages pursuant to the National Housing Act or similar federal programs and assigned to the Government. Thus, in United States v. View Crest Garden Apartments, Inc., 268 F. 2d 380, 382 (C.A. 9), certiorari denied, 361 U.S. 884, this Court emphasized: " * * * we do find it to be clear that the source of the law governing the relations between the United States and the parties to the mortgage here involved is federal." See, in addition, Herlong-Sierra Homes, Inc. v. United States, 358 F. 2d 300 (C.A. 9), and United States v. Queen's Court Apartments, Inc., 296 F. 2d 534 (C.A. 9). Indeed, recently in Clark Investment Co. v. United States, 364 F. 2d 7, 9 (C.A. 9), another case involving an FHA mortgage, this Court stated: "It is too well settled to require extended discussion that federal law is * * * applicable."

This rule has been uniformly followed in every federal court of appeals that has considered the question. See, e.g., Penagariacano v. Allen Corp., 267 F. 2d 550, 558 (C.A. 1); United States v. Walker Park Realty Corp., 383 F. 2d 732 (C.A. 2); United States v. Flower Manor, Inc., 344 F. 2d 958 (C.A. 3); United States v. Woodland Terrace, Inc., 293 F. 2d 505 (C.A. 4); United States v.

Sylacauga Properties, Inc., 323 F. 2d 487, 491 (C.A. 5); United States v. Helz, 314 F. 2d 301 (C.A. 6); United States v. Chester Park Apartments, Inc., 332 F. 2d 1, 4 (C.A. 8); Director of Revenue, State of Colorado v. United States, _____ F. 2d ____ (C.A. 10, No. 9640, decided April 1, 1968).

There is no merit to the suggestion of the district court that state law controls because the United States, as assignee of Prudential, assertedly gained only the rights that Prudential would have had under state law (Tr. 24-25). Federal law governs the present case because the loan was made under a nationwide federal mortgage guarantee program. Despite the fact that the actual loan funds were provided by Prudential, the Government has been involved with this loan from its very beginning. As pointed out above (p. 3), the loan was obtained only after Stadium Apartments, Inc., had met FHA approval as a mortgagor, had applied for and received a commitment of insurance from FHA for the specific loan, and had met various eligibility tests defined by the FHA. The mortgage and note themselves were executed on FHA forms. And of course the FHA had all along been obligated to purchase the note and mortgage from Prudential upon default of the mortgagor. In short, the note and mortgage in the present case were federal contracts in which the United States participated from the outset, and in whose execution the United States was vitally interested. Regardless of whether or not Prudential's rights might have been governed by state law had the note and mortgage not been assigned to the United States, it is clear that the rights of the United States after assignment

are governed by federal law. Cf., Small Business Administration v. McClellan, 364 U.S. 446, 452. Indeed, in many cases decided by this Court and other courts of appeals involving mortgages pursuant to federal programs, the notes and mortgages had been assigned to the Government by private lendors, and it was held that federal law controlled. In none of the cases was there any suggestion that state law might control the rights of the United States because it was the assignee of a private lendor. E.g., Clark Investment Co. v. United States, supra; United States v. View Crest Garden Apartments, supra; United States v. Sylacauga Properties, Inc., supra. United States v. Walker Park Realty Co., supra.

Even assuming arguendo that state law governed the rights of the parties before the assignment of the note and mortgage to the United States (which assumption is highly dubious), the district court's apparent belief that the United States may not exercise its federal law rights and prerogatives when it is the assignee of a private party was erroneous. The Supreme Court specifically rejected such reasoning in United States v. Summerlin, 310 U.S. 414. There, the United States, on behalf of the Federal Housing Administrator, was the assignee of a claim against the estate of J. F. Andrew. The United States asserted the claim against the administratrix in a Florida state court proceeding. The Florida courts held that the claim was "void" as not having been brought within the time prescribed by a Florida statute. The Supreme Court reversed. It pointed out that the defenses of state statutes of limitations and

laches were not available against the United States. It then continued: "We are of the opinion that the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of this rule." 310 U.S. at 414. This rule has found frequent application in other areas. For example, with respect to the United States' federal law rights of having debts owed to it satisfied before those of other creditors, it is uniformly held that the Federal Government is entitled to such priority for debts due it even where the debts are the result of claims assigned to the United States by private persons who could not themselves invoke the priority rights under federal law. E.g., United States v. Anderson, 334 F. 2d 111 (C.A. 5); Korman v. Federal Housing Administrator, 113 F. 2d 743 (C.A. D.C.).

In sum, it is clear that the rights of the United States under the mortgage here involved are determined by federal law.

II

A UNIFORM FEDERAL RULE NOT ALLOWING FOR A POST-SALE PERIOD OF REDEMPTION IS REQUIRED IN CASES SUCH AS THIS.

Having established that federal rather than state law sets the terms of this foreclosure action, we turn to the question of whether it would be proper for federal law to adopt the Idaho State practice of allowing a period after the foreclosure sale during which the mortgagor or others interested in the property might redeem.

The determination that federal law governs an issue arising under a nationwide program usually requires the application of

a uniform rule rather than the adoption of principles of local law as the federal rule. For the adoption of local law tends to defeat the very purpose of the supremacy clause and the Rules of Decision Act--the avoidance of "disparities, confusions and conflicts" following from the application of varied state law rules. See United States v. Allegheny County, 322 U.S. 174, 183.

A principal consideration upon which turns the determination of whether a uniform rule or local law is ultimately to be applied as the federal law, is the need for uniformity of administration. Thus, in the Clearfield Trust decision, supra, the Supreme Court declared that except for the "occasional" instances in which there is no compelling need for uniformity, federal law must be applied to assure the uniform administration of the nationwide federal program or activity involved (318 U.S. at 367):

> In our choice of the applicable federal rule we have occasionally selected state law. See Royal Indemnity Co. v. United States, supra, [313 U.S. 289, 296-297]. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the

> vagaries of the laws of the several states. The desirability of a uniform rule is plain. * * * 14/

Whether the United States should be subject to the post-foreclosure-sale periods of redemption imposed by state law is plainly a question which should be answered uniformly, without reference to the variety of state laws. The courts have with unanimity recognized the nationwide character of federal mortgage insurance programs and the need for uniformity in resolving legal issues arising under them. See, e.g., the cases cited p. 10 , supra. Among the primary reasons for applying a uniform rule has been the great diversity among the states on the issues which have arisen involving mortgage transactions. Because of this diversity, if there were no uniform federal rule to govern the matter, the FHA, before insuring mortgages or making loans, would be forced to weigh not only the considerations made relevant by the National Housing Act, but also the countervailing considerations raised

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14/ By contrast, an example of a situation calling for application of state law is found in United States v. Yazell, 382 U.S. 341. There, the Supreme Court held that the Texas law of coverture, under which Mrs. Yazell had no capacity to bind her separate property, would apply to a Small Business Administration contract. The factors which the Supreme Court noted as governing its decision were: first, that the contract was "a custom-made, hand-tailored, specifically negotiated transaction. It was not a nationwide act of the Federal Government emanating in a single form from a single source" (382 U.S. at 348); second, the case involved the "peculiarly local" matter of family property rights and liabilities.

Neither of these factors is present here. Indeed, as this Court noted in Clark Investment, supra, 364 F. 2d at 9, the Supreme Court "expressly distinguishes" FHA mortgage cases, such as the present case, from its Yazell holding by pointing out that the FHA "issues separate [mortgage] forms for each State but does not negotiate with individual applicants." 382 U.S. at 348. The Sixth Circuit, in United States v. Carson,

(fn. continued on next page)

by "the vagaries of the laws of the several states." Clearfield Trust Co. v. United States, supra, 318 U.S. at 367. Thus, projects in some states would be financed by FHA-insured mortgages, while in other states the obtaining of mortgage insurance might be constricted or withheld because the United States would not have the prospect of obtaining the full measure of the pledged security. Such a result would be contrary to Congress's intent of creating a nationwide program "* * * to assist in relieving the acute shortage of housing which now exists and to increase the supply of housing accommodations available to veterans of World War II at prices within their reasonable ability to pay * * *." 12 U.S.C. 1738.

This Court has often held that state rules may not impinge upon the uniform federal rule where to do so would impair the federal policies involved. A most extensive discussion of the standards for determining the choice between federal and state law is found in this Court's opinion in United States v. View Crest Garden Apartments, 268 F. 2d 380 (C.A. 9). That case concerned the question of whether the state law of Washington or federal law should determine whether a receiver should be appointed after default of an FHA mortgage. After noting that the source of law governing the question was federal, the

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14/ (Continued):
372 F. 2d 429, 432-434 (C.A. 6) and the Tenth Circuit, in Director of Revenue, State of Colorado v. United States, F. 2d , (C.A. 10, No. 9640, decided April 1, 1968) have found the Yarell decision similarly limited.

opinion states:

> It is * * * equally clear that if the law of the State of Washington is to have any application in the foreclosure proceeding, it is not because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal policy. [Emphasis added.]

268 F. 2d at 382. The Court then proceeded to analyze the federal policies which applied. It pointed out that compliance with state recording acts and use of the state definition of "mortgage", for instance, do not interfere with, and indeed aid federal policy by obviating the need for a separate federal system of recordation. But the Court then drew a sharp line distinguishing the application of state law in such matters from its application to limit the remedies of the United States upon breach:

> A different set of factors come into play when the planning stage and the working stage of the agreement have been terminated. After a default the sole situation presented is one of remedies. Commercial convenience in utilizing local forms and recording devices familiar to the community is no longer a significant factor. Now the federal policy to protect the Treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act -- to facilitate the building of homes by the use of federal credit -- becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty can not be adopted. [Emphasis added.]

Using this standard, this Court, and other courts of appeals, have refused to apply state law where such application would negate the effect of federal policies. See, e.g., Herlong-Sierra Homes, Inc. v. United States, supra; United States v. Flower Manor, Inc., supra;

United States v. Walker Park Realty Corp., supra (cases which hold that the right of the United States to a deficiency judgment is not limited by state statutes or practice); United States v. Queen's Court Apartments, Inc., supra; United States v. Sylacauga Properties, Inc., supra (cases holding that federal law governs the right of the United States to have a receiver appointed).

Particularly relevant to the present case is this Court's recent decision in Clark Investment Co. v. United States, supra. That case involved another FHA project in Idaho, but there, in contrast to the present case, the United States had consented to a post-foreclosure-sale period of redemption. 15/ The issue in Clark was whether the federal courts ought to apply that portion of 2 Idaho Code 11-407 (the same statute involved here) which provides that the redemptioner is entitled to have the rents which are collected from the time of sale to the time of redemption deducted from the redemption price. This Court again held that "the federal courts, in fashioning applicable federal rules, can use or adopt state rules where no federal policy would be impaired" (364 F. 2d at 9). Pointing out that the

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15/ P. 15-16 of the Brief of the Appellee (United States) on appeal in Clark Investment Co. v. United States, 364 U.S. 7 (C.A. 9, No. 19,999). See United States v. West Willow Apartments, Inc., 245 F. Supp. 755, 757-758 (E. D. Mich.), holding that the United States is not bound by state statutes imposing post-sale redemption but that the United States is free to consent to the use of this device.

Idaho rule on disposition of rents was one of many disparate state rules, the Court concluded that "the federal policy to protect the treasury and to promote the security of federal investment requires a uniform federal rule." Ibid.

The present case questions whether another portion of the same Idaho statute may be applied in federal mortgage foreclosure actions. We contend that considerations similar to those applied by this Court in such cases as Clark Investment preclude the application here of state law.

Because post-foreclosure-sale periods of redemption exist only where created by statute (Madison Properties, Inc. v. United States, 375 F. 2d 740, 741 (C.A. 9)), and as the majority of jurisdictions have no such statutes, the failure of Congress to provide for a redemption period is as forceful as expression of federal policy as a positive statement. 16/ Moreover, the state rules threatening the federal policy are diverse. Seventeen states have laws imposing post-foreclosure-sale periods of

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16/ Congress has specifically provided for a post-sale right of redemption lasting one year as a condition of jurisdiction over the United States in foreclosure actions in which the United States is a junior lienor. 28 U.S.C. 2410(c), which provision is made inapplicable to the National Housing Act by 12 U.S.C. 1701. See Madison Properties, Inc. v. United States, 375 F. 2d 740, 741 fn. 3 (C.A. 9).

Congress's express provision for a post-sale period of redemption in such narrow circumstances indicates a Congressional intent to limit the use of the post-sale redemption to those circumstances.

redemption varying in length from six months to eighteen months. One state postpones the foreclosure sale until a one-year period for redemption after judgment has expired. 18/ The majority of states have no such statutes.

It is also readily demonstrable that imposition of a post-foreclosure-sale period of redemption does significantly impair the effectiveness of the federal foreclosure remedy. The natural effect of the imposition of the post-sale period of redemption is to chill the bidding at the sale, because the purchaser at the sale may not obtain a clear title to the property, but obtains a title which can be defeated by a redemptioner who may redeem at any time until the period has expired. Therefore, the amounts bid at such sales, when there is bidding at all, are artifically low. In such circumstances, the United States is forced to bid for the property, because ultimate sale of the property for a fair price is almost always the only feasible way for the United States to collect a sizable proportion of the debt

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17/ Alaska Statutes 09.45.190, 09.35.250 (1 year); 4 Ariz. Rev. Stat. 12-1282 (6 months); 2 Ark. Stat. 1947 Ann. 30-440 (1 year); Cal. Code Civ. Proc. 725a (1 year); 77 Ill. Ann. Stat. 18c (1 year); 4 Kan. Stat. Ann. 60-2414 (6 to 18 months); Mich. Stat. Ann. 27A.3140 (6 months); 29 Vernon's Ann. Mo. Stat. 443.410 (1 year); 7 Rev. Code Mont. 98-5836(2) (1 year); 1 Nev. Rev. Stat. 21.200 (1 year); 5 N. Mex. Stat. Ann. 24-2-19, 24-2-19.1 (9 months); 6 N. Dak. Cent. Code. 32-19-18 (1 year); 1 Ore. Rev. Stat. 23.560 (1 year); Utah Rules Civ. Proc., Rule 6(f)(3) (6 months); 4 Vermont Stat. Ann. Title 12, App. III, Rule 39 (1 year Rev. Code Wash. Ann. 6.24.140 (8 months or 1 year).

18/ Wisconsin Stat. Ann. 278.10(2) (1 year before sale).

due it, [19] for as in the present case, the defaulting mortgagor is usually judgment-proof. But, having bought the property, the United States may not hope to sell it at a fair price until the period of redemption is over, for the same reason that the sale itself brings depressed bids: while the right of redemption remains outstanding the United States cannot deliver clear title to the property.

Nor may the United States, if it purchases the property at the sale, make substantial improvements on the property during the redemption period in order to render it more attractive for ultimate resale. The redemption price as formulated by the Idaho statute is the sum of the purchase price, assessments and taxes, the prior liens of the purchaser (excepting the judgment lien held by the mortgagee), and interest. The fair market value of improvements made by the purchaser is not included, and while there is no Idaho case on this point, it has elsewhere been held that a mortgagee who purchases at the foreclosure sale is not permitted to make improvements that will render it more difficult for the mortgagor to redeem. [20] See Wise v. Layman, 197 Ind. 393, 150 N.E. 368; Bowen v. Boughner, 189 Conn. 107, 224 S. W. 653.

19/ The Secretary is authorized to purchase at the sale "for the protection of the General Insurance Fund." 12 U.S.C. 1713(k), made applicable to loans under Title VI by 12 U.S.C. 1744(f).

20/ The identical rationale would seem to apply to a purchaser who was not the mortgagee. Such a purchaser could similarly not count on making improvements until the redemption period had expired, even though he would have to pay for normal maintenance. This provides another reason why the foreclosure sale would not bring the fair market price.

Thus, the net effect of the imposition of the post-sale-redemption period is to force the United States to buy the property and to maintain it in the status quo until the redemption period expires. This causes the FHA to freeze its funds in a dormant project which it cannot sell until the period is over. In addition, the FHA must pay for the expenses of its custodianship of the property, and must involve itself in the concomitant administrative tasks. These impediments render the foreclosure remedy more costly and more time-consuming. The district court's imposition of the post-foreclosure-sale period of redemption thus diverts the money and energies of the FHA from use "for the prime purpose of the Act -- to facilitate the building of homes by the use of federal credit * * * ." United States v. View Crest Garden Apartments, supra, 268 F. 2d at 383.

Therefore, owing to the diversity of state rules with regard to post-foreclosure-sale redemption, if the district court's ruling stands, the uniform nationwide administration of the National Housing Act may well be disrupted. 21/

21/ The mortgage form in the present case contains the following language: "The mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws" (R. 14). Therefore, even if this Court rules that the district judge was correct in applying Idaho law, we contend that the mortgagor has waived its rights under state law. While we have found no Idaho case on this point, waiver of the statutory post-foreclosure-sale period of redemption appears to be generally permitted. E.g., King v. King, 215 Ill. 100, 74 N.E. 89; Cook v. McFarland, 78 Iowa 528, 43 N.W. 519; Nipel v. Hammond, 4 Colo. 211. Contra: Beverly v. Davis, 79 Wash. 537, 140 P. 696.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, insofar as it imposes a post-foreclosure-sale period of redemption, the judgment of the district court be reversed.

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

JOHN C. ELDRIDGE,
DANIEL JOSEPH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

MAY 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Daniel M. Joseph

DANIEL M. JOSEPH
Attorney,
Department of Justice,
Washington, D.C. 20530.

Subscribed and Sworn to before me this 14th day of May, 1968.

Notary Public

My Commission expires August 31, 1971.

No. 22,709

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

N. A. DEGERSTROM, INC. & BOWER MACHINERY CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT

EDWIN L. WEISL, JR.,
Assistant Attorney General,

SMITHMORE P. MYERS,
United States Attorney,

JOHN C. ELDRIDGE,
STEPHEN R. FELSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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IN THE UNITED STATES COURT OF APPEALS
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No. 22,709

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FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appellee, N. A. Degerstrom, Incorporated, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for property damage allegedly caused by the negligence of a government employee. On September 18, 1967, the district court entered judgment for Degerstrom (I.R. 59); [1] this judgment was modified on November 2,

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1/ "I.R." refers to the Transcript of Record reproduced by the Clerk; "II.R." refers to the "Record of Proceedings at the Trial", which is Volume II of the record on appeal.

1967 (I.R. 69), and a notice of appeal was filed on December 29, 1967 (I.R. 71). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action against the United States for damage to a piece of heavy equipment. The equipment, a Model 988 loader, was owned by Bower Machinery Company and leased to the appellee, N. A. Degerstrom, Incorporated (hereafter the "Contractor") (I.R. 44).[2/] The Army Corps of Engineers then leased the equipment, with operator, from the Contractor for flood emergency work near Colfax, Washington (I.R. 23). The parties executed the standard plant and equipment lease agreement, which contained the following provision, known as Article 5 (I.R. 5):

> Contractor's Responsibility. The Contractor shall be responsible that his employees strictly comply with all Federal, State, and municipal laws that may apply to operations under the contract; and it is understood and agreed that the Contractor assumes full responsibility for the safety of his employees, plant, and materials and for any damage or injury done by or to them from any source or cause, except damage caused to plant or equipment by acts of the Government, its officers, agents or employees, in which event such damage will be the responsibility of the Government in accordance with applicable Federal laws.

While at the site of the flood control work, the Contractor's operator (McKelvy) dropped the loader on a rock in

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2/ Bower was made a nominal plaintiff below (I.R. 56); it is not involved in this appeal, since damages were only awarded to Degerstrom.

the bed of a stream and cracked the transmission case (I.R. 45). The Contractor then brought this action against the government for the cost of its repairs, contending inter alia that its operator was a "loaned servant" at the time the damage occurred, and that therefore the government was liable for his negligence (I.R. 38).

The district court found that McKelvy, the operator, was on the Contractor's payroll (I.R. 47), and that he was in fact "an employee of Degerstrom [the Contractor]" (I.R. 45, 49). 3/ It also found that "he was competent and possessed of the requisite skill and experience. * * * Mr. McKelvy knew the hazards involved, such as flooding the machine, high centering it or cutting the tires" (I.R. 45). With respect to the accident, the court found that the Corps of Engineers' employee in charge of the operation "told Mr. McKelvy to perform certain work including the removal of certain culverts and the piling of rocks along or upon the banks of the stream" (I.R. 69). "Mr. McKelvy was directed to work when and where Mr. Breckon of the Corps of Engineers told him to, but the operational details were left to Mr. McKelvy" (I.R. 70). The accident occurred while the loader was in the bed of the stream (I.R. 45). The operator indicated that he was not receiving any hand signals at the time of the accident (II.R. 117, 118).

3/ The original opinion also states that the operator's salary was paid by the United States (I.R. 50). At the request of the government (I.R. 63, par. 4), this finding was stricken by the court (I.R. 70, par. 4), since it was obviously in conflict with other portions of the opinion (see I.R. 47, 49).

The court below concluded that the damage to the loader occurred "as a direct and proximate result of negligence on the part of Ralph McKelvy," the operator of the machine (I.R. 58). It then held as a matter of law that the "loaned-servant" doctrine made the government liable for the negligence of the Contractor's operator (I.R. 58), presumably both under the terms of Article 5 of the lease agreement and independently of that provision.

SPECIFICATIONS OF ERRORS

1. The district court erred in failing to find that Article 5 of the lease agreement made the Contractor liable for the damage to its equipment caused by the negligence of the Contractor's operator, regardless of whether the operator was a "loaned servant" of the government.

2. The district court erred in holding that the Contractor's operator was a "loaned servant" of the government, and that therefore the government was liable for damages to the Contractor's equipment caused by his negligence.

ARGUMENT

Introduction

1. This Court need not reach the question whether the operator of the Contractor's equipment was a common law "loaned servant" of the government at the time of the accident. Under the terms of the lease agreement, the parties clearly contracted

to divide responsibility for any damage occurring during the term of the lease. Article 5 of that agreement provided that "the Contractor assumes full responsibility * * * for any damage or injury done by or to" his employees or equipment, "except damage caused to * * * equipment by acts of the Government, its officers, agents or employees * * * ." The obvious intent of this provision was to fix the Contractor's responsibility for damages caused by its employees, including the operators of its own equipment. Any other view would render the clause meaningless; its clear purpose was to prevent just the type of "loaned-servant" claim which appellee is asserting in this action.

2. Even absent Article 5 of the lease agreement, the operator of the Contractor's loader was not an "employee of the government" within the meaning of the Federal Tort Claims Act, 28 U.S.C. 2671, and the government cannot be held liable to the Contractor under that Act for damage to the Contractor's equipment caused by the negligence of this operator. As the district court correctly recognized (I.R. 49), federal law governs the question of who is an employee under the Act. Brucker v. United States, 338 F. 2d 427, 428 n. 2 (C.A. 9). And, under the applicable federal law and general agency principles, the lessor of equipment with operator, not the lessee, is liable for the negligence of the operator in these circumstances. See Standard Oil Co. v. Anderson, 212 U.S. 215; Restatement (Second), Agency § 227.

I. UNDER THE TERMS OF THE LEASE AGREEMENT, THE CONTRACTOR, NOT THE GOVERNMENT, WAS TO BEAR ANY LOSS CAUSED BY THE NEGLIGENCE OF THE OPERATOR OF THE CONTRACTOR'S EQUIPMENT.

Absent contract or statute, traditional tort law, under the doctrine of respondeat superior, holds a master liable for the torts of his employees while they are acting within the scope of their employment and subject to his control. See Restatement (Second), Agency §§ 219(1), 220(1). In a situation where an employer supplies an employee to another person, it is possible under certain circumstances for the employee to be deemed a "loaned servant" of the other person for purposes of fixing tort liability for a given act. Id., § 227. In a potential "loaned-servant" situation, it is of course possible for the two masters to agree to apportion liability on some other basis than traditional tort law. An examination of the lease agreement in the instant case, in which the Contractor leased a loader and operator to the Corps of Engineers to engage in certain flood-control work, shows that Article 5, entitled "Contractor's Responsibility," did provide for a different apportionment of risk than that found at common law. For this reason, the district court erred in incorporating the common law doctrine of "loaned-servant" liability into the contract, thereby completely abrogating its effect.

Article 5 provides, in pertinent part (emphasis added):

> [I]t is understood and agreed that the Contractor assumes full responsibility for the safety of his

employees * * * and materials and for any damage or injury done by or to them from any source or cause, except damage caused to * * * equipment by acts of the Government, its officers, agents or employees, in which event such damage will be the responsibility of the Government in accordance with applicable Federal laws.

Thus the Contractor by this provision assumed "full responsibility for the safety of his employees * * * and for any damage or injury done by * * * them" except where government officers, agents or employees caused the damage. The district court read the Contractor's responsibility for damage done by his "employees" as excluding responsibility for the operator of the leased machine. Instead the court held that this operator was an "employee" of the government, thus making the government liable for his negligent damage to the Contractor's equipment.

This reading is inconsistent with the plain intent of the parties. It is apparent that the only employee of the Contractor even remotely connected with this contract was the operator of the machine -- neither party had any reason to agree on tort liability for the actions of the Contractor's employees back in its shop. Therefore, the only "employee" who could conceivably be covered by the clause governing the Contractor's responsibility was this operator, if the clause is to be given any meaning at all. Conversely, without Article 5 the government would already be liable for the operator's torts under the "loaned-servant" doctrine, if applicable. Under the Contractor's reading of the

provision, this common law rule is merely incorporated into the lease agreement. Clearly, the restatement of this rule in every standard plant and equipment lease would be a total waste of effort. The provision should instead be read to accomplish its obvious purpose: to place the risk of loss on the Contractor for torts by the Contractor's regular employees, and on the government for torts of the government's regular employees. This interpretation would obviate the necessity of resolving each particular case of negligence by a leased operator to decide whether under all of the circumstances he had become a servant of the lessee with respect to the act of negligence involved. It is the only practical view of the provision and the only interpretation which accomplishes the plain intent of the parties; it should therefore be adopted by this Court.

Our view is also in accord with the plain meaning of the words of Article 5 itself. The parties used the word "employees," not "servants," both in the clause providing for the Contractor's responsibility and in the clause excepting acts of government "officers, agents or employees." If the "loaned-servant" doctrine was intended to be incorporated into the contract, it is reasonable to assume that the parties would have chosen the word "servants" to indicate this intent. The Restatement, supra, speaks in terms of loaned servants, not loaned employees. The cases also use this phraseology. See, e.g., New Orleans-Belize SS. Co. v. United States, 239 U.S.

202, 206; George A. Fuller Co. v. McCloskey, 228 U.S. 194, 202. Furthermore, the clause exempting acts of government employees also uses the words "officers" and "agents," which clearly refer to regularly employed personnel of the government. The word "employees" should be read in the same manner under the doctrine of ejusdem generis.

Other provisions of the lease agreement support our view that the term "employees" means regularly employed persons, without any dependence on the common law "loaned-servant" doctrine. Article 13(a) provides that "the Contractor will not discriminate against any employee because of race," etc. (I.R. 6; emphasis added). Under the theory of the Contractor in this case, its regular employees become employees of the government while on the job and under some government "control". This theory could be held to relieve the Contractor of its obligation under this clause (i.e., its obligation not to discriminate) during that time, a result clearly not intended by the parties to the agreement. Similarly, Article 12, providing that the Contractor must discharge "objectionable employees" (I.R. 6), plainly was intended to apply to all regular employees of the Contractor, and not to exclude those temporarily under the "control" of the government.

These examples of the contract language, standing alone and when viewed in the context of the purpose of Article 5, show that the parties intended a clear division between government employees -- such as contracting officers, Corps of

Engineers' officials, and others hired and paid by the government -- and the Contractor's employees brought to the job to operate the equipment (or supplied with the plant in plant-leasing situations). There was no intent that the same individual be shuttled back and forth between masters depending upon which clause of the agreement was being applied. The word "employees" has a consistent meaning throughout the agreement; there is no reason to incorporate the "loaned-servant" doctrine into Article 5, thereby making it inconsistent with the rest of the agreement. This is especially true in view of the fact that the parties in Article 5 intended to fix tort liability irrespective of the common law rules of respondeat superior. Therefore, although (as we will show below) the district court also erred in holding that McKelvy was a "loaned servant" of the government at the time of the accident, judgment for the government should have been granted on the basis of Article 5 of the lease agreement regardless of where common law tort liability would fall.

II. EVEN IF THERE WERE NO LEASE AGREEMENT, OR IF IT IS INTERPRETED TO INCLUDE THE CONCEPT OF THE "LOANED SERVANT", UNDER THE FACTS OF THIS CASE THE OPERATOR OF THE CONTRACTOR'S EQUIPMENT WAS NOT A "LOANED SERVANT" OF THE UNITED STATES AT THE TIME OF THE ACCIDENT.

As we pointed out above, the Contractor's interpretation of Article 5 of the lease agreement, which incorporates the common law doctrine of "loaned-servant" liability, renders the provision meaningless as an attempt to apportion responsibility

for tort liability arising during the term of the lease. However, we now show that, even under this interpretation (or indeed if there were no lease agreement, which is the practical effect of the decision below), the Contractor and not the government would be responsible for damages caused to the Contractor's equipment by the negligence of the Contractor's operator in the circumstances of this case.

The district court correctly held (I.R. 49) that federal law controls the issue whether an individual is an "employee of the Government" within the meaning of the Federal Tort Claims Act, 28 U.S.C. 2671. E.g., Brucker v. United States, 338 F. 2d 427, 428 n. 2 (C.A. 9), certiorari denied, 381 U.S. 937; LeFevere v. United States, 362 F. 2d 352, 353 (C.A. 5); Fisher v. United States, 356 F. 2d 706, 708 (C.A. 6), certiorari denied, 385 U.S. 819; Blackwell v. United States, 321 F. 2d 96, 98 (C.A. 5). And, under federal law and general agency principles as applied to circumstances of this case, the lessor of the equipment with operator is clearly responsible for the damage to its own equipment caused by the negligence of its own operator.

One of the leading cases in this area, Standard Oil Co. v. Anderson, 212 U.S. 215, involved the furnishing of a winch and operator by the defendant to a stevedoring company. "The winchman was hired and paid by the defendant, who alone had the right to discharge him." Id. at 219. Hand signals were given by the employees of the stevedore to help the winchman in his operation of the equipment; the injury involved (to an employee of the

stevedore) was caused by the negligent failure of the winchman to obey one of these signals. The Supreme Court held that the winchman was not a loaned servant of the stevedore, so that the injured employee could maintain a tort action against the winchman's general employer, the owner of the winch (212 U.S. at 226):

> Much stress is laid upon the fact that the winchman obeyed the signals of the gangman * * * . [But] the giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters.

This holding has been followed numerous times by the federal courts. See, e.g., George A. Fuller Co. v. McCloskey, 228 U.S. 194, 202-204; New Orleans-Belize SS. Co. v. United States, 239 U.S. 202, 206 ("Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person."); Geraghty v. Lehigh Valley R. Co., 70 F. 2d 300, 304 (C.A. 2) (general directions by "borrower" of train crew not enough to establish "loaned-servant" situation). Most state law is to the same effect. See, e.g., Radich v. United States, 160 F. 2d 616 (C.A. 9) (involving California law since it was not a Federal Tort Claims Act suit against the United States); Bartholomeo v. Charles Bennett Contracting Co., 245 N.Y. 66, 156 N.E. 98; Miller v. Woolsey, 240 Iowa 450, 35 N.W. 2d 584.

The instant case is far stronger on its facts against the application of the "loaned-servant" doctrine than the cases cited above. In those cases (and of course in cases holding the lessee liable)there was always some active participation by the alleged new master in the operation of the equipment, such as hand signals or detailed instructions. In the instant case, however, the operator testified (II.R. 117):

> There wasn't any signals. I just was making a trip. I had made several trips and this happened. I bumped this rock and caused the damage.

See also II.R. 118. The loader was some 75 feet from the Corps of Engineers supervisor when the accident occurred. Furthermore, the supervisor did not tell the operator "where to drive in the river * * * or how to operate the machine" (II.R. 46; see also II.R. 116, 120). It was the operator's decision whether to go into the river or use the access road at this particular time (II.R. 35). In these circumstances the government cannot be said to have had any control whatsoever over the actions of the operator beyond telling him where to pile the rocks. This much control would seemingly be present in every case where the borrowing party wants something done, but the cases are clear that only where considerably more control is present can the lessee

of equipment with operator be held responsible for the operator's negligence. 4/

General agency principles are in full accord with the proposition that a person in the general employ of one master does not become the servant of another merely because the latter has general authority to direct him as to the work to be done. The Restatement (Second), Agency § 227, comments b and c, set out the applicable factors (emphasis added):

> b. Inference that original service continues. In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it.
>
> c. Factors to be considered. Many of the factors stated in Section 220 which determine that a person is a servant are also useful in determining whether the lent servant has become the servant of the borrowing employer. Thus a continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist.

4/ McCollum v. Smith, 339 F. 2d 348 (C.A. 9), is not to the contrary. In that case the lessee told the operator, through hand signals, exactly where to place each beam being lifted by the rented crane. This Court held that such direction had "the force of a command." Id. at 351. The instant case is far removed from the McCollum situation. Furthermore, McCollum was apparently a diversity case, in which only the law of Hawaii and not federal law applied.

> A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interests of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control.

Turning to the facts of the instant case, it is clear that all of the factors indicating that the general employer should be held liable for the actions of his employee are present here. The Contractor could of course substitute one operator for another at any time; indeed, he might sometimes be required to do so under the agreement (I.R. 6 -- Article 12). The time of employment was of short duration, estimated to be 100 hours (I.R. 12). The operator was found by the district court to have had the "skill of a specialist" (I.R. 45).

Continuing with the factors set out in comment c, supra, the machine and operator were rented together, precisely the example given in the comment, and the machine had the "considerable value" of $65,000 (I.R. 70, par. 8). The servant was

"expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire * * * ." The record is clear that McKelvy was only under instructions to obtain a certain result at the time of the accident, namely, "the removal of certain culverts and the piling of rocks along or upon the banks of the stream" (I.R. 69). "[T]he operational details were left to Mr. McKelvy" (I.R. 70; II.R. 46, 116, 120).

Finally, the Contractor was not a gratuitous citizen lending his government the use of his personal equipment for humanitarian purposes, but rather a corporation engaged in the business of operating heavy equipment (II.R. 112). Two valuable items, a tractor and the loader, were leased under this contract, including "operator, fuels, lubricants, and all other operating supplies," at a total price of $71.00 per hour (I.R. 12). The price paid by the government would ordinarily include insurance costs (II.R. 107), and presumably the Contractor was adequately insured. While the record does not indicate whether the Contractor ever rented other machines, the renting of these two items in these circumstances brings the case within the principles set out in the Restatement.

The application of these agency principles to the facts of this case thus demonstrates that the district court erred in holding that the Contractor "retained no control" over McKelvy (I.R. 50). Of course, the Contractor, like the Corps of Engineers, left the details of the job to the operator; but

this does not mean that the Contractor had no "control" for purposes of the "loaned-servant" rule. If the servant did not pass into the employ of the government at the time of the accident, the Contractor remained his master regardless of the fact that the operator himself controlled the details of the job. No one is contending that the operator became an independent contractor (of course, if this were true there could be no recovery from the government for his negligence).

The practical significance of the district court's holding would be truly anomalous. For example, if a homeowner hires a bulldozer and operator to help build a driveway, and directs the operator as to where to place the excess dirt, he would have the same control over the operator as the Corps of Engineers had over McKelvy in this case. However, no one would contend that the homeowner must reimburse the owner of the bulldozer when the operator negligently lands upon a rock and damages the machine. Compare Restatement (Second), Agency § 227, illus. 1, 2. That is exactly what is being contended here, and we submit that this result cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed with directions to enter judgment for the defendant.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General,

SMITHMORE P. MYERS,
United States Attorney,

JOHN C. ELDRIDGE
STEPHEN R. FELSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MAY 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Stephen R. Felson

STEPHEN R. FELSON
Attorney,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

STEPHEN R. FELSON, being duly sworn, deposes and says:

That on May 31, 1968, he caused three copies of the foregoing Brief for Appellant to be served by air mail, postage prepaid, upon counsel for the appellee:

Lawrence Monbleau, Esquire
Cashatt, Williams, Connelly & Rekofke
650 Lincoln Building
Spokane, Washington 99201

Stephen R. Felson
STEPHEN R. FELSON
Attorney,
Department of Justice,
Washington, D. C. 20530.

Subscribed and Sworn to before me this 31st day of May, 1968.

Audrey Anne Crump
NOTARY PUBLIC

My Commission expires August 31, 1971

[SEAL]

No. 22,709

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Appellees.

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BRIEF FOR APPELLEE N. A. DEGERSTROM, INC.

LAWRENCE MONBLEAU
Cashatt, Williams, Connelly & Rekofke
650 Lincoln Building
Spokane, Washington 99201
Attorneys for
Appellee N. A. Degerstrom, Inc.

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LAWRENCE MONBLEAU
Cashatt, Williams, Connelly & Rekofke
650 Lincoln Building
Spokane, Washington 99201
Attorneys for
Appellee N. A. Degerstrom, Inc.

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BRIEF FOR APPELLEE N. A. DEGERSTROM, INC.

JURISDICTION

Appellee N. A. Degerstrom, Inc., agrees that the District Court had jurisdiction of this action by virtue of 28 U.S.C., § 1346 (b), the Federal Tort Claims Act, and that this Court has jurisdiction under the provisions of 28 U.S.C., § 1291.

COUNTER-STATEMENT OF THE CASE

Appellant in its brief has advanced two contentions for the reversal of the judgment entered in this action: First, that the District Judge erroneously

held that Mr. McKelvy, the operator of the damaged loader, was a loaned servant in the government's employ at the time this accident occurred, and second, that Article 5 of the lease agreement entered into between appellant and appellee foreclosed application of the loaned servant doctrine and required that appellee bear the loss for the damage to the loader.

Appellee will discuss the second of appellant's contentions under an appropriate heading in its brief and in its counter-statement of the case will limit itself to a review of the evidence which in its view clearly required the District Court to find and conclude, as it did, that appellant reserved and exercised an exclusive right of control over the operator of the leased loader in the performance of the flood control work undertaken and under familiar principles of tort liability thus rendered itself liable for his negligence in its operation.

The City of Colfax, Washington, is located approximately 65 miles south of Spokane. It derives its supply of water for domestic purposes from

a water system that in part courses beneath the surface of the south bank of the north fork of the Palouse River (II.R. 22).[1] Sometime prior to March 7, 1965, at a point approximately one-quarter of a mile northeast of the city limits, due to erosion of the south bank of the river, a section of the water system dropped into the river resulting in an interruption of the city's supply of water (II.R. 21, 22).

To remedy the situation thus created, the Department of the Army, Corps of Engineers, through its district office at Walla Walla, Washington, undertook certain emergency flood control work in the area (II.R. 22). Mr. Frank L. Breckon was designated as project supervisor of the work to be performed which in part consisted of the removal of several culverts from the river and the rip-rapping of the south river bank for a distance of about 300 feet to prevent or at least retard the occurence of any further erosion (II.R. 22, 24, 25, 30). Mr. Breckon's function as project supervisor, according to his testimony, was "to direct how the work was to be performed" (II.R. 24).

[1] For the sake of clarity, appellee will designate its references to the record in the same manner as that followed by appellant in its brief -- "I.R." being used to refer to the Transcript of Record reproduced by the Clerk and "II.R." for reference to the Record of Proceedings at the Trial, Volume II of the Record on Appeal.

To accomplish the flood control work he was to direct and supervise, Mr. Breckon determined that he would require, among other equipment, a D8 tractor or bulldozer and a Model 988 loader (II.R. 26). After ascertaining that appellee N. A. Degerstrom, Inc., hereinafter referred to as Degerstrom, had such equipment available and was willing to lease it to the government, Mr. Breckon channeled a formal request for its acquisition by the Department of the Army's district office at Walla Walla for his use on the flood control project (II.R. 25, 26).

Thereafter, a form lease prepared by appellant captioned "Hire of Plant or Equipment by Government" was entered into with Degerstrom under the terms of which, for a consideration of $8,183.60, Degerstrom agreed to furnish a Model 46AD8 tractor and a Model 988 loader complete with operators, fuels, lubricants, and all operating supplies for use by appellant on the flood control project for a period of 100 hours (Ex. 103). Under paragraph 2 of Schedule "A", the lease provided that

> "Equipment is required for flood emergency work in the vicinity of Colfax, Washington. The mobilization and demobilization points, and the work to be accomplished in these areas will be directed by the Project Supervisor, Corps of Engineers, Colfax, Washington." (Ex. 103)

Following execution of the lease, Mr. N. A. Degerstrom, President of

N. A. Degerstrom, Inc., dispatched a tractor operated by Mr. S. Cupp and a loader operated by Mr. Ralph McKelvy to Colfax where they were met at a pre-arranged point by Mr. Breckon and escorted to the jobsite by him (II.R. 27-29). Degerstrom did not furnish anyone in a supervisory capacity to oversee the activities of Cupp and McKelvy at the jobsite, but left their supervision to Mr. Breckon (II.R. 28). In this connection, McKelvy testified that he was dispatched to the jobsite under the following circumstances:

"Q. What instructions did you receive from Mr. Degerstrom or from one of your superiors with the company as to what you should do on the job?

"A. Just to do as I was told.

"Q. With the machine?

"A. Yes." (II.R.122)

Once at the jobsite, Mr. Breckon gave both Cupp and McKelvy instructions concerning the work they were to perform (II.R. 29-31). The length of the shift they were to work was established by Mr. Breckon (II.R. 29). McKelvy was assigned the task of rip-rapping the south bank of the river, a process that required him to haul material stockpiled on the north bank across the bed of the river where it was then deposited and positioned according to detailed instructions that were given to him by Mr.

Breckon (II.R. 30-31, 120-121). Mc Kelvy testified that he was unfamiliar with the type of rip-rapping involved on the job and was taught how to rip-rap in the desired fashion by Mr. Breckon (II.R. 30, 120).

While the rip-rapping of the south bank was apparently the principal work performed by McKelvy, Mr. Breckon also made use of him to remove certain culverts in the area and he was otherwise at liberty to make use of McKelvy and the loader operated by him for such purposes as he saw fit, a circumstance that is clear from the following of Mr. Breckon's testimony:

"Q. I take it Mr. Breckon, from what you have told me, that Mr. McKelvy and his loader were down there on the job site to be used pretty much for whatever purpose you directed him for, if I make myself clear?

"A. I'd tell him what I wanted done, and he'd do it.

"Q. He was there to carry out such orders as you might give him?

"A. Yes." (II.R. 34-35)

On March 7, 1965, Mr. Breckon instructed McKelvy to perform certain work including the removal of culverts and the piling of rocks along or upon the banks of the river (I.R. 50, 69). While engaged in carrying out the instructions given him by Mr. Breckon, McKelvy negligently struck a submerged rock in an area of the river to which he had apparently been

summoned by Mr. Breckon and damaged the loader he was operating (II.R. 32-33). As Mr. Breckon testified,

"Q. You had directed him to the area where the culvert was located?

"A. I motioned that there was a culvert there.

"Q. In other words, he was in the process at the time this accident happened, of carrying out a request that you were making of him?

"A. Yes. I would say yes." (II.R. 32-33)

As a result of the accident the loader was damaged to the extent of $3,340.00, an amount that appellant stipulated Degerstrom was entitled to recover by way of damages if the District Court held that it was liable for the accident (II.R. 60).

The case was called for trial before the Honorable Charles L. Powell, sitting without a jury, on July 17, 1967. Evidence and arguments were concluded on the day following at which time the case was taken under advisement by the Court (II.R. 167). On September 7, 1967, the Court filed its Memorandum Decision specifying therein, pursuant to the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure, that the decision would constitute the Findings of Fact in the case (I.R. 44, 52).

In summary the District Court held in its Memorandum Decision that at the time of the accident resulting in the damage to the loader McKelvy was

a loaned servant in appellant's employ for whose negligence appellant was liable under both common law principles of liability and the provisions of Article 5 of the lease agreement.

Following the entry of appropriate Conclusions of Law (I.R. 59-60) and an order adding Bower Machinery Company the owner of the loader involved, as a nominal party plaintiff (I.R. 56), the District Court entered a judgment which simply awarded Degerstrom money damages in the amount of $3,430.00 plus costs, (I.R. 59-60) from which appellant filed a timely Notice of Appeal (I.R. 71).

ARGUMENT

1. BASED ON SUBSTANTIAL EVIDENCE THE DISTRICT COURT CORRECTLY FOUND THAT McKELVY WAS A LOANED SERVANT IN APPELLANT'S EMPLOY AT THE TIME THIS ACCIDENT OCCURRED.

This Court, in common with most if not all others that have considered the question, has held that the element of control is the cardinal consideration in determining whether a servant in the general employ and pay of one person becomes the servant of another to whom he has been loaned or hired so as to render that other liable for the servant's negligence in the performance of work entrusted to him. In McCollum v. Smith, (9th Cir., 1965) 339 Fed. (2d) 348, under facts not dissimilar from those involved in this case, this Court held, as a matter of law, that the operator of a leased

crane was a loaned servant in the lessee's employ insofar as negligence in the operation of the crane was concerned, and said

> "'When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect to his acts in that service, is to be dealt with as the servant of the latter and not of the former.'"
>
> "In deciding this issue, a factor usually considered to be controlling is the location of the power to control the servant, for responsibility is regarded as a correlative or power. The Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 53 L.Ed. 480 (1909); Chicago, Milwaukee & St. Paul Ry. Co. v. City of Tacoma, 7 F.2d 586 (9th Cir. 1925); Western Marine & Salvage Co. v. Ball, 59 App.D.C. 208, 37 F.2d 1004 (1930); Nepstad v. Lambert, 235 Minn. 1, 50 N.W.2d 614 (1951); 17 A.L.R.2d 1388, 1393, § 2."

The law of the State of Washington is in full accord with the rules this Court applied in the McCollum case, supra, for determining when and under what circumstances the loaned servant doctrine is applicable. Davis v. Early Constr. Co., 63 Wn. (2d) 252, 386 Pac. (2d) 958 (1963); Nyman v. MacRae Bros. Constr. Co., 69 Wn. (2d) 285, 418 Pac. (2d) 253 (1966).

Insofar as the element of control in this case is concerned , appellant would have this Court believe that it exercised no more control over McKelvy than did the home owner in the hypothetical example referred to at page 17 of its brief who hired a bulldozer, complete with operator, and was held liable for damage to the machine caused by the operator's negligence simply for having told the operator where to place excavated material. If a parallel is intended between that situation and this, it badly misses the mark, as is apparent from the District Court's Memorandum Decision which constitutes the Findings of Fact in the case.

Bearing on a consideration of whether appellant or Degerstrom exercised control over McKelvy at the time the accident resulting in the damage to the loader occurred, the District Court, based on substantial evidence, and we do not understand appellant to contend otherwise in its brief, made the following Findings of Fact, all of which appear at page 7 of the decision (I.R. 50):

(1) "That Degerstrom retained no control over him and the method in which he would operate the machine . . ."

(2) "The machine, the loader, was to be operated under the direction of the 'Project Supervisor, Corps of Engineers.'"

(3) "Mr. McKelvy was directed to work when and where Mr. Breckon told him to . . . "

(4) " . . . that Mr. McKelvy was the servant of the United States of America at the time of the accident and was under its direction and therefore his actions made the government liable."

As this Court is well aware, findings of fact are presumptively correct and will not be set aside unless "clearly erroneous." The burden of demonstrating that findings are clearly erroneous rests heavily on the party challenging them. As this Court is equally well aware, it is under no obligation to search the record in appellant's behalf for evidence on which to base new or different findings in this case and in light of the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure has consistently refused to do so even in cases decided by district courts on written records.

Lundgren v. Freeman, (9th Cir., 1962) 307 Fed. (2d) 104;

Brucker v. U.S., (9th Cir., 1964) 338 Fed. (2d) 427;

Santa Anita Mfg. Corp. v. Lugash, (9th Cir., 1966) 369 Fed. (2d) 964.

Significantly, not only has appellant failed to demonstrate that the Findings of Fact made by the District Court are clearly erroneous, it has failed to so much as challenge these Findings on that basis. As a result, we earnestly urge that appellant should be and is bound by the District Court's Findings of Fact establishing that McKelvy was a loaned servant in its employ at the time the accident occurred.

Independently, however, of the District Court's Findings of Fact concerning McKelvy's status as a loaned servant, appellee is confident that a review of the record will convince this Court that the result reached in the court below is fully justified and was clearly required in view of this court's decision in McCollum v. Smith, (9th Cir., 1964) 339 Fed. (2d) 348, and the following decisions of the Washington State Supreme Court on which the District Court relied in deciding the case, observing in the process that there were no appreciable differences between federal and Washington law on the issue involved (I.R. 49):

B & B Bldg. Material Co. v. Winston Bros. Co., (1930) 158 Wash. 130, 290 Pac. 839;

McHugh v. King Co., (1942) 14 Wn. (2d) 441, 128 Pac. (2d) 504;

Davis v. Early Constr. Co., (1963) 63 Wn. (2d) 252, 386 Pac. (2d) 958;

Nyman v. MacRae Bros. Constr. Co., (1966) 69 Wn. (2d) 285, 418 Pac. (2d) 253

Appellant in its brief, however, has seemingly taken the position that because the operational details of the loader, a valuable piece of equipment, which took some skill to operate, were left to McKelvy, the District Court was in error in determining that the loaned servant doctrine

was applicable.

Obviously, the actual operation of any piece of heavy equipment, the value of which is generally substantial, is a one-man job that as a matter of common knowledge usually requires some special skill or training on the part of its operator. If actual participation by a lessee in the operation of such equipment were a prerequisite to the application of the loaned servant doctrine, or the fact that such equipment was valuable and could only be operated by a person with some special skill or training prevented its application, it is difficult, if not impossible, to conceive of any situation to which the doctrine could apply. Yet, it is frequently applied to situations involving the leasing of fully operated heavy equipment. Annotation, 17 A.L.R. (2d) 1388.

In the final analysis, regardless of the value of such equipment, the skill required to operate it, or the fact that its operational details rest with the operator, the true test for determining whether the operator becomes the servant of a person to whom he and machine have been leased is and remains, as this Court pointed out in McCollum v. Smith, (9th Cir., 1964) 339 Fed. (2d) 348, quoting with approval from the case of Nepstad v. Lambert, (Minn., 1951) 50 N.W. (2d) 614, " . . . which employer had the right to control the particular act giving rise to the injury." In this case the record establishes and the District Court found, as a matter of fact, that

appellant, to the exclusion of Degerstrom, had control over McKelvy at the time the act causing the damage to the loader occurred.

Appellant has cited no authority in its brief which suggests or employs a different test. And, insofar as appellant's reliance on Restatement (Second), Agency, § 227, is concerned, we think it is misplaced. Fairly read, section 227 is simply authority for the proposition that whether the loaned servant doctrine is appliable in a given case is generally, as it was in this case, an issue of fact to be decided by the trier of the facts. Restatement (Second), Agency, § 227, p. 500.

Regarding appellant's contention that the lack of signals from Mr. Breckon is fatal to the District Court's determination that McKelvy was a loaned servant, appellee does not regard that signals are necessary to the doctrine's application under the circumstances of this case or for that matter in any case. Moreover, the contention overlooks or ignores the following of Mr. Breckon's testimony which, in appellee's view, establishes that the practical equivalent of a signal was being given by Mr. Breckon at the time of the accident:

"Q. In other words, he was in the process at the time this accident happened, of carrying out a request that you were making of him?

"A. Yes. I would say yes." (II.R. 32-33)

Fairly summarized, the facts in this case disclose a situation in which appellant leased a fully operated loader, reserving in the lease agreement the right to direct and control the work to be performed by the operator. It fully exercised that right on the jobsite in the person of its project supervisor who used both the operator and the loader in a manner no different than either would or could have been used had appellant owned the loader and directed its use by an operator in its regular employ. As Mr. Breckon testified concerning his use of McKelvy and the loader operated by him, "I'd tell him what I wanted done, and he'd do it." (II.R. 35).

Under such circumstances appellee submits that the District Court correctly found that McKelvy was in fact a loaned servant in appellant's employ for whose negligence it should be held liable.

2. UNDER THE PROVISIONS OF ARTICLE 5 OF THE LEASE AGREEMENT APPELLANT IS LIABLE FOR THE NEGLIGENCE OF A LOANED SERVANT.

Appellant has argued at some length in its brief that under the provisions of Article 5 of the lease agreement appellee should bear the loss for the damage to the loader. It reaches this conclusion through a process of interpolation by reading Article 5 as though it were written to limit the government's responsibility for damage caused to leased equipment to that which

results from the negligence of its regular employees. Article 5, however, does not so provide, but contains a clear agreement on appellant's part that

" . . . damage caused to . . . equipment by the acts of the Government, its officers, agents or employees, will be the responsibility of the Government in accordance with applicable Federal laws."

The District Court concluded that the term "employee", as used in the quoted portion of Article 5, when considered in connection with applicable federal law, included a loaned servant (I.R. 51). Its conclusion in this regard rests on a sound basis.

Applicable federal law, the Federal Tort Claims Act, 28 U.S.C., § 1346 (b), under which this action was brought, provides for the government's liability as to any loss " . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant . . ."

The definition of the term "employee" as used in the Act includes a person temporarily acting on behalf of a federal agency, 28 U.S.C., § 2671, and has been specifically held to include a loaned servant. Martarano v. U.S., (Nev., 1964) 231 Fed. Supp. 805.

Appellee submits that the District Court correctly concluded that

appellant's agreement in Article 5 to be responsible for damage caused to a contractor's equipment by the acts of its employees included as well an undertaking on its part to assume liability as to any such damage caused by a loaned servant.

Appellant maintains at page 8 of its brief, however, that the use of the word "employee" rather than "servant" indicates an intent on its part to exclude liability for the negligence of a loaned servant. The terms servant and employee are synonymous, and this Court has so held, pointing out that wherever either is used in an agency context, the usual rules of respondeat superior are to be applied. Burcker, v. U.S., (9th Cir., 1964) 338 Fed. (2d) 427.

If appellant under the provisions of Article 5 intended to exclude liability on its part for damage caused to leased equipment by a loaned servant, it should have given clear expression to that intent. This it failed to do, if in fact, that was its intention. Appellant, after all, drafted Article 5 and under familiar rules of construction the language used by it, if doubtful or susceptible of more than one meaning, should be strictly construed against it.

Caterpillar Tractor Co. v. Collins Machinery Co., (9th Cir., 1960) 286 Fed. (2d) 446;

Reconstruction Finance Corp. v. Sullivan Mining Co., (9th Cir.,

1956) 230 Fed. (2d) 247

However, even without applying a strict construction to Article 5 and attributing to the language used therein its ordinary, every-day meaning, this Court should affirm the imposition of liability on appellant by reason of its agreement in Article 5 to accept responsibility for damage caused to leased equipment by the acts of government employees, terminology which, as appellee has shown, includes a loaned servant.

CONCLUSION

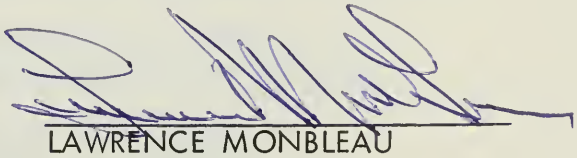
The District Court correctly found that McKelvy was a loaned servant in appellant's employ at the time this accident occurred and correctly concluded that Article 5 of the lease agreement rendered appellant liable for negligence on his part while acting within the scope of his employment. Appellee respectfully submits that the judgment entered by the District Court should be affirmed.

Respectfully submitted,

LAWRENCE MONBLEAU
CASHATT, WILLIAMS,
CONNELLY & REKOFKE
Attorneys for Appellee
650 Lincoln Building
Spokane, Washington 99201

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



LAWRENCE MONBLEAU
Attorney for Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,709

UNITED STATES OF AMERICA,

Appellant,

v.

N. A. DEGERSTROM, INC., & BOWER MACHINERY CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR APPELLANT

EDWIN L. WEISL, JR.,
Assistant Attorney General,

SMITHMORE P. MYERS,
United States Attorney,

JOHN C. ELDRIDGE,
STEPHEN R. FELSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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REPLY BRIEF FOR APPELLANT

As we pointed out in our main brief, there are two separate reasons why this Court should reverse the judgment of the district court, which held the government liable to the Contractor for damage to the Contractor's equipment caused by the negligence of the Contractor's employee. First, the parties executed a contract which placed the risk of loss for this type of damage upon the Contractor. Second, apart from the contract, the Contractor's employee was not a common law "loaned servant" of the government in the circumstances of this case, and

therefore the government cannot be held liable for his torts.[1/]

We find nothing in the Contractor's brief which casts doubt upon either of the above arguments. However, there is one proposition of law asserted in that brief which requires an answer.

Appellees devote less than four pages of their brief (pp. 15-18) to a discussion of Article 5 of the lease agreement. No mention is made of the purpose of this provision, which was clearly intended to apportion the risk of damage to equipment without regard to common law liability (Appellant's Brief, pp. 6-10). In answer to our contentions, the Contractor apparently urges (Appellees' Brief, p. 16) that 28 U.S.C. 2671 requires a contrary result. This argument is without merit.

That section provides, in part:

> "Employees of the government" includes * * * persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

1/ The Contractor's brief (pp. 10-11) asserts that the government does not contest the trial court's findings concerning the government's exercise of control over the employee. On the contrary, at pages 10-17 of our main brief we argue that the government did not have such control as a matter of law. If this is held to be correct, of course, the trial court's findings would be "clearly erroneous."

We know of no authority for the proposition that this section precludes the government and a lessor of equipment from contractually apportioning the liability for damage to the equipment involved.[2/] The case cited by the Contractor, Martarano v. United States, 231 F. Supp. 805 (D. Nev.), merely holds that the government may be held liable for the negligence of a loaned servant over whom it exercises complete control. We do not, of course, dispute this principle; we only urge that it does not apply here, since (1) the government did not exercise sufficient control over the Contractor's employee, and (2) even if it did, the Contractor agreed in Article 5 of the lease agreement to assume "full responsibility for the safety of his employees * * * and for any damage or injury done by * * * them," regardless of where common law liability would fall.

CONCLUSION

For the above reasons, and for the reasons stated in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General,

SMITHMORE P. MYERS,
United States Attorney,

JOHN C. ELDRIDGE,
STEPHEN R. FELSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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2/ The intent of the quoted portion of the section was to include as a federal employee the "dollar a year man" or a similar person rendering temporary service to the government. See Gottlieb, The Federal Tort Claims Act -- A Statutory Interpretation, 35 Geo. L.J. 1, 11, n. 36.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Stephen R. Felson

STEPHEN R. FELSON
Attorney,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

STEPHEN R. FELSON, being duly sworn, deposes and says:

That on August 22, 1968, he caused three copies of the foregoing Reply Brief for Appellant to be served by air mail, postage prepaid, upon counsel for the appellee:

Lawrence Monbleau, Esquire
Cashatt, Williams, Connelly
& Rekofke
650 Lincoln Building
Spokane, Washington 99201

Stephen R. Felson

STEPHEN R. FELSON
Attorney,
Department of Justice,
Washington, D.C. 20530.

Subscribed and Sworn to before
me this 20th day of August, 1968.

NOTARY PUBLIC

No. 22,710

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

SAN CLEMENTE PUBLISHING CORPORATION;
COASTLINE PUBLISHERS, INC., Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

WARREN M. DAVISON,
ROBERT M. LIEBER,
Attorneys,

National Labor Relations Board.

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UNITED STATES COURT OF APPEALS

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v.

SAN CLEMENTE PUBLISHING CORPORATION;
COASTLINE PUBLISHERS, INC., Respondents

ON PETITION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order (R. 32-33)[1] issued against respondents (hereafter "the Company") on August 10, 1967, and reported at 167 NLRB No. 2. The

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[1] The original papers in the case have been reproduced and transmitted to the Court pursuant to Rule 10(2). "R" refers to the formal documents bound as "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated "GCX" and "JX" are to the General Counsel's exhibits and the Joint Exhibit, respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following, to the supporting evidence.

unfair labor practice occurred at San Clemente, California, where the Company is engaged in business as a newspaper publisher. The Court has jurisdiction of the proceedings under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[2]

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Prior to the events herein, respondent's composing room personnel—a concededly appropriate unit (R. 20; GCX 1(e), 1(*l*)) consisting, at all material times, of 5 employees (R. 20)—were unrepresented by a labor organization. In October 1966, the Union[3] and the Company agreed to allow a "mutually acceptable" third party to poll the unit employees to see if they wanted union representation (R. 21; GCX 1(e), para. 6(a)(b), GCX 1(*l*), JX). The Company agreed to recognize the Union as the collective bargaining agent of the employees if a majority of them expressed that preference (*Ibid.*). A person agreeable to both sides was selected, and the poll was conducted on October 24 (R. 21; GCX 1(e), para. 7, 8, GCX 1(g), GCX 1(*l*), JX). The Company was advised that a "majority" of the employees desired that the Union represent them (*Ibid.*). A few days later the Company, pursuant to its agreement and following a request by the Union, recognized the Union as its employees' exclusive bargaining representative (R. 21; GCX 1(e), para. 9, GCX 1(*l*)).

The first bargaining session was held on November 29 (R. 21; GCX 1(e), para. 10, GCX 1(*l*), JX). Although agreement was not reached, it is undisputed that the parties had not reached an impasse at the end of the meeting (*Ibid.*).

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[2]The pertinent provisions of the Act are printed as Appendix A to this brief, *infra.*

[3]Orange Typographical Union No. 579, International Typographical Union, AFL-CIO.

In early December 1966, one of the unit employees quit his job and was replaced by a new employee (R. 21; Tr. 31, JX). A few days later, three of the five employees in the unit told Company officials that when the poll had been taken the employees had favored union representation by a vote of 3 - 2 (R. 21; Tr. 40-41, JX). Now that one employee had been replaced, they reported, employee sentiment was 3 - 2 against the Union (*Ibid.*). The three employees presented a written petition to the Company, stating that they had no wish to be represented by the Union (*Ibid.*). Shortly thereafter the Company withdrew recognition from the Union, and since then has refused to recognize the Union as its employees' bargaining representative (R. 21; GCX 1(e) para. 12, GCX 1(*l*), JX).

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing, the Board, in agreement with the Trial Examiner found that the Company violated Section 8(a)(5) and (1) of the Act by terminating a legally established bargaining relationship without permitting such relationship to function for a reasonable period of time.

The Board's order (R. 26, 32-33) requires the Company to cease the unfair labor practice found and from in any like or related manner interfering with its employees' rights under the Act, Affirmatively, the Board ordered the Company to bargain with the Union as the exclusive representative of its employees in the unit and to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY TERMINATING A LEGALLY ESTABLISHED BARGAINING RELATIONSHIP WITHOUT PERMITTING SUCH RELATIONSHIP TO FUNCTION FOR A REASONABLE PERIOD OF TIME

As related in the Statement, *supra,* the Company, in late October, recognized the Union as the exclusive bargaining representative of its employees. After only one bargaining session, the Company, on December 14, withdrew recognition from the Union after 3 of the 5 unit employees said they did not desire union representation. The only question presented, therefore, is whether the Board properly found the Company's conduct to be a violation of Section 8(a)(5) and (1) of the Act.

It is well-settled that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. N.L.R.B.,* 321 U.S. 702, 706. Moreover, it is clear that the bargaining relationship must be given a fair chance to succeed even if, shortly after the attainment of its majority status, the union loses that status through no fault of the employer. *Ray Brooks v. N.L.R.B.,* 348 U.S. 96; *Retail Clerks Union, Local 1179 v. N.L.R.B. (John P. Serpa, Inc.),* 376 F.2d 186, 191 (C.A. 9). In *Brooks,* the union won a Board conducted election by the narrow margin of 8-5. A week after the election, and prior to the Board's certification of the union, the employer received a letter signed by nine of the thirteen employees stating that they no longer wished to be represented by the union. The employer thereupon refused to bargain. The Court expressly rejected the argument that "whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain." 348 U.S. at 103. Upholding the Board, the Court held that despite the evidence of loss of majority, the elec-

tion results must be honored for a reasonable period of time and, at least until the passage of such period, the actual majority status of the union and the employer's beliefs with respect thereto did not justify a refusal to bargain. Reasons advanced by the Board in support of this result have relevance here and are quoted approvingly in the Court's opinion (348 U.S. at 100):

* * *

> (c) A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.
>
> (d) It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.

* * *

Thus, the Court recognized that it would be detrimental to the Congressionally encouraged process of peaceful negotiation if employers and unions knew that the union's authority was subject to revocation each and every time the employee sentiment shifted. If the collective bargaining process is to succeed, there must be an initial period in which that authority must be free from challenge. Under a contrary rule, a recalcitrant employer would obviously have much to gain by delay. *Retail Clerks Union, Local 1179 v. N.L.R.B. (Serpa), supra,* 376 F.2d at 191. Even a law-abiding employer would be deterred by the knowledge that time and effort put into negotiations could be set at naught should the union lose its majority before a final contract had been signed and thereby lose its authority to enter into a binding agreement. From the Union's point of view, there would be immense pressure to score a quick contract victory, perhaps by the application of ill-considered and disruptive economic action against the employer, rather than face the

possibility of loss of support during a lengthy negotiating period. In addition to *Brooks, supra,* see, e.g., *N.L.R.B. v. Holly-General Co.,* 305 F.2d 670, 675 (C.A. 9); *N.L.R.B. v. Appalachian Electric Power Co.,* 140 F.2d 217, 221-222 (C.A. 4). Only if the parties can rely on the continuing representative status of the lawfully recognized union, at least for a reasonable period of time, can bargaining negotiations succeed and the policies of the Act be effectuated.

The instant case is distinguishable from *Brooks, supra,* only in that here the bargaining relationship was established after a third party, at the request of the parties, determined that a majority of the employees desired to be represented by the Union, whereas in *Brooks* the union's majority had been established by a Board election. We submit, however, that this distinction is without consequence here.

It has long been settled that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers v. Arkansas Oak Flooring,* 351 U.S. 62, 72, n. 8. Thus, unless he has a good faith doubt of the Union's majority, an employer must recognize a Union as his employees' exclusive representative after the Union demonstrates its majority—whether by authorization cards or some other reliable method. *Snow v. N.L.R.B.,* 308 F.2d 687, 692 (C.A. 9); *N.L.R.B. v. W. T. Grant Co.,* 199 F.2d 711, 711-712 (C.A. 9), cert. denied, 344 U.S. 928; *N.L.R.B. v. Trimfit of California, Inc.,* 211 F.2d 206, 208-210 (C.A. 9); *N.L.R.B. v. Sehon Stevenson & Co., Inc.,* 386 F.2d 551, 552 (C.A. 4). See also, *N.L.R.B. v. Hyde,* 339 F.2d 568, 570-571 (C.A. 9). "The manner in which an employer receives reliable information of union representation, whether by accident or by design, or even when the employer is seeking to avoid receiving it, is of no consequence. Once he has received such information from a reliable source, insistence upon a Board election can no longer be defended on the grounds of a genuine doubt as to majority status." *Snow v. N.L.R.B., supra,* 308 F.2d at 692.

Indeed, Congress, in 1947, expressly rejected a proposed amendment to the Act which would have required an employer to recognize a union *only* where it had been certified as the winner of a Board election. See, Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L.Rev. 851, 861, and the legislative history cited at 861, n. 45 (1967).

Thus, there can be no question that the bargaining relationship was lawfully entered into. Thereafter, it, like the relationship in *Brooks,* should be given a fair chance to succeed. Unless this bargaining relationship is insulated in its initial stages from the pressures described in *Brooks,* the purpose of the Act to foster healthy and peaceful collective bargaining will be poorly served. The potential evils described by the Supreme Court in *Brooks*—encouraging delay by recalcitrant employers, deterrence of conscientious employers fearful that their time and effort will be wasted because the union may lose support at the last moment, and inordinate pressure on unions to "produce" or be turned out —are equally present whether the relationship be initially established by election or other lawful means.

In *Franks Bros., supra,* the bargaining relationship was not initially established by an election. There, despite the fact that a majority of the employees had designated a union, the employer had illegally refused to bargain. The Board issued a bargaining order which the company resisted on the ground that the union had lost its majority since the institution of the unfair labor practice proceeding due to a turnover in the Company's work force. 321 U.S. 702, 703-704. It was in this context that the Court ruled that bargaining relationships rightfully established must be given a reasonable chance to succeed, citing *N.L.R.B. v. Appalachian Power Co.,* 140 F.2d 217 (C.A. 4), a case identical to the later *Brooks* case. Consistent with *Franks Bros.,* an employer has been held to be obligated to bargain for a reasonable

period of time, following a court decree,[4] Board order,[5] or a settlement agreement,[6] even though the union subsequently suffered a loss of majority.

The facts here show that the bargaining relationship was given virtually no chance of success. Only one bargaining

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[4] *N.L.R.B. v. Warren Co.*, 350 U.S. 107, 112; *N.L.R.B. v. Vander Wal*, 316 F.2d 631, 633-634 (C.A. 9).

[5] *Int'l Ass'n of Machinists v. N.L.R.B.*, 311 U.S. 72, 82-83; *Great Southern Trucking Co. v. N.L.R.B.*, 139 F.2d 984, 985 (C.A. 4), cert. denied, 322 U.S. 729; *N.L.R.B. v. Consolidated Mach. Tool Corp.*, 167 F.2d 470 (C.A. 2); *N.L.R.B. v. Tower Hosiery Mills*, 180 F.2d 701, 706 (C.A. 4), cert. denied, 340 U.S. 811; *N.L.R.B. v. S. H. Kress & Co.*, 194 F.2d 444, 446 (C.A. 6); *N.L.R.B. v. J. C. Hamilton Co.*, 220 F.2d 492, 495 (C.A. 10). See also, *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 909 (C.A. 9), cert. denied 379 U.S. 961.

[6] *Poole Foundry & Mach. Co. v. N.L.R.B.*, 192 F.2d 740 (C.A. 4), cert. denied, 342 U.S. 954; *W. B. Johnston Grain Co.*, 154 NLRB 1115, 1116, 1118-1120. In a recent case in this area, *N.J. MacDonald & Sons, Inc.*, 155 NLRB 67, the employees designated a union as their bargaining representative on May 18, 1964. When the employer refused to bargain, a complaint alleging violation of Section 8(a)(5) and (1) of the Act issued. A settlement agreement was entered into providing, *inter alia*, that the employer would bargain upon request with the union. Nine bargaining sessions took place between the time this settlement agreement was entered into and January 25, 1965. On that latter date, approximately six months after the settlement agreement was signed, eleven of the thirteen unit employees presented the employer with a petition rejecting the union. The employer then refused to bargain. 155 NLRB at 69-70. Citing and relying on *Brooks, supra*, the Board held that "it would not be conducive to industrial peace and stable labor relations for an employer to rely on such employee dissatisfaction in refusing to bargain with a union which is the employees' statutory bargaining representative", 155 NLRB at 72, where the potentials of negotiations had not been exhausted and a reasonable period of time had not elapsed since the commencement of negotiations. There, as here, there had been no certification of the union following a Board election. Nevertheless, the Court of Appeals for the First Circuit affirmed the Board in a *per curiam* opinion, *N.L.R.B. v. N. J. MacDonald & Sons*, 62 LRRM 2296, No. 6686, decided May 5, 1966, holding that the Board had not acted arbitrarily in ruling that the employer's refusal to bargain was unwarranted.

session was held after the Company recognized the Union, and only two weeks later recognition was withdrawn. We submit that the Board properly held that once a union is lawfully recognized, an expression of employee dissatisfaction with it does not justify a refusal to bargain if that expression is manifested before the collective bargaining relationship has had a reasonable period of time in which to succeed.[7] *Universal Gear Service Corp.*, 157 NLRB 1169, enforcement pending, No. 17,699 (C.A. 6); *Montgomery Ward & Co., Inc.*, 162 NLRB No. 27, enforcement pending No. 16,602 (C.A. 7); *N. J. MacDonald & Sons, Inc., supra*, n. 6. And since a reasonable period of time had not expired prior to the instant refusal to bargain, the Company should be required to resume the illegally aborted negotiations.[8]

---

[7]Of course, since the employees' dissatisfaction with the union prior to the expiration of such reasonable time does not excuse the employer's obligation to bargain, his action in continuing to bargain does not constitute illegal assistance of the union, and is not violative of Section 8(a)(2) and (1) of the Act. *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 585-587.

[8]Note that the Supreme Court in *Franks Bros.* was careful to reaffirm the employees' ultimate right to reconsider their initial choice of a bargaining agent. The Court stated (321 U.S. at 705-706):

> [A] Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See *Great Southern Trucking Co. v. Labor Board*, 139 F.2d 984, 987. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. See *Labor Board v. Appalachian Power Co.*, 140 F.2d 217, 220-222; *Labor Board v. Botany Worsted Mills*, 133 F.2d 876, 881-882. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.

See also, *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 909 (C.A. 9), cert. denied, 379 U.S. 961.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order of the Board in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
WARREN M. DAVISON,
ROBERT M. LIEBER,
Attorneys,
National Labor Relations Board.

May 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

APPENDIX B

Pursuant to Rule 18(f) of the rules of the Court

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
(Pages)			
1(a) through L 1(m)	4	4	4

JOINT EXHIBIT

1	13	13	13

WITNESS FOR THE GENERAL COUNSEL

Karl Wray	
Direct	14
Cross	36

WITNESS FOR RESPONDENT

Lyman Powell	
Direct	42
Cross	52

No. 22,710

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SAN CLEMENTE PUBLISHING CORPORATION; COASTLINE PUBLISHERS, INC.,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

VAN DE WATER, POWELL & PATERSON,
By LEE T. PATERSON,
1100 Glendon Avenue,
Los Angeles, Calif. 90024,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

Jurisdiction.

As stated in General Counsel's Brief, this Court has jurisdiction, which is conceded by Respondent.

Statement of the Case.

In October, 1966, San Clemente Publishing Corporation and the Orange Typographical Union, No. 579, International Typographical Union, AFL-CIO[1] orally agreed to have a minister determine whether the Com-

[1]San Clemente Publishing Corporation, Respondent in this Case, will be hereinafter referred to as "Company", and Orange Typographical Union No. 579 will be hereinafter referred to as "Typographical Union" or "Union".

pany's employees wished to be represented by the Typographical Union [R 21, JX 1].[2] On October 28, 1966, the minister polled the Company's five Composing Room employees and told the parties that a "majority" of the employees wished Union representation [*Ibid.*]. No actual count of the votes, however, was given to either of the parties. Both parties indicated their willingness to proceed in good faith as they had agreed [*Ibid.*].

On about November 29, 1966, the parties met for bargaining negotiations [*Ibid.*]. Neither party's conduct was found to be dilatory or in bad faith.

Sometime during the following week one of the employees in the bargaining unit terminated, and he was replaced by a new employee [R 21, Tr. 41, JX]. Thereupon, on December 8, three of the Company's five employees voluntarily presented themselves to the manager of the Company and stated that they did not wish to be represented by the Typographical Union [R 21, Tr. 40, JX]. They revealed that in the prior poll by the minister only three of the five Composing Room employees had wanted the Union and that now three of the five employees did not want the Union. The employees submitted a signed petition stating that they did not wish to be represented by the Union [R 21, JX].

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[2]"R" refers to the formal documents bound as "Volume I, Pleadings"; "Tr" refers to the stenographic transcript of testimony at the hearing. References designated "GCX" and "JX" are to the General Counsel's exhibits and the Joint Exhibit, respectively.

In view of the wishes of a majority of its employees, the Company withdrew recognition of the Union on December 14, 1966 [R 21; GCX 1(e) para. 11; GCX 1-(1)]. Subsequently, the Company filed a petition for a representation election with the National Labor Relations Board which the Board rejected because of the pendency of this proceeding [R 22].

The Trial Examiner found that the Company "did not give the agreed bargaining relationship a reasonable opportunity to function" and that the Union ". . . notwithstanding its loss of majority status following recognition, has been at all material times, and now is, the exclusive bargaining representative. . . ." [R. 24]. The Trial Examiner concluded that the Company had violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act [R 25]. The National Labor Relations Board affirmed all of the Trial Examiner's findings and ordered the Company to bargain with the Union [R 32-3].

ARGUMENT.

The Board's Order Requires the Respondent to Bargain With the Uncertified Representative of Less Than a Majority of His Employees and Therefore Cannot Be Enforced.

Respondent withdrew recognition from the Orange Typographical Union when a majority of its five employees tendered a petition stating that they no longer wished to be represented by the Union. The only question to be decided is whether this violates Respondent's duty ". . . to bargain collectively with the representatives of his employees . . ." [Section 8(a)(5) Taft-Hartley Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 158 (a)(5)].

Contrary to Petitioner's Brief, it is not "well-settled that 'a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed'" (Petitioner's Br. p. 4). Instead, the courts and the Board have held that a company must bargain for one year in the case of NLRB conducted secret-ballot elections,[3] and for a "reasonable period" in the case of Board Orders and Settlement Agreements.[4] The rule which was applied in this case holding that an employer must bargain with an informally selected union after it has lost its majority was created

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[3]*Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176 (1954); *N.L.R.B. v. Holly-General Co.*, 305 F. 2d 670 (9th Cir. 1962).

[4]*I.A.M. v. N.L.R.B*, 311 U.S. 72, 61 S. Ct. 83 (1940); *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 64 S. Ct. 817 (1944).

by the Board in 1966[5] and has never been enforced by the courts.

In *Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176 (1954), the Supreme Court approved the rule that absent unusual circumstances, an employer must bargain with a union for one year following an NLRB conducted secret-ballot election. However, the Court was careful to point out that the courts and the Board had never approved the rule "to a collective bargaining relationship established other than as the result of a *certification election*" (Italics supplied) (*Id.* at footnote 9). In its decision, the Court noted the difference between certification elections and voluntary recognition:

> "Since an election is a solemn and costly occasion conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." (*Id.* at 99, 100).

An NLRB secret-ballot election is easily understood by employees as a formal procedure which requires careful deliberation and which will bind the employee in his decision. Other methods of determining employee

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[5]See *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Montgomery Ward & Co., Inc.*, 162 NLRB No. 27, decision pending (7th Cir.) No. 16, 602.

choice (*e.g.*, employee polls, card counts, mass meetings and petitions) are less formal and are easily susceptible to coercive pressures and mob psychology. In numerous recent cases the courts have refused to require employees to bargain with unions selected under these conditions.[6] As stated in one of those decisions:

> "It is well known that people solicited alone and in private, will sign a petition and later, solicited alone and in private, will sign an opposing petition, in each instance out of concern for the feelings of the solicitors and the difficulty of saying 'no'. This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow employees and of potentially powerful union organizers may weigh heavily in the balance."
>
> *N.L.R.B. v. S.S. Logan Packing Co., supra,* at 565.

Peaceful negotiations are only one part of stable and orderly industrial relations. Congress and the courts have recognized this by guaranteeing employees the right to join or not join labor organizations[7] and

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[6]*N.L.R.B. v. S.E. Nichols Co.*, 380 F. 2d 438 (2nd Cir. 1967); *N.L.R.B. v. S.S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967); *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759 (5th Cir. 1967); *N.L.R.B. v. Shelby Mfg. Co.*, 390 F. 2d 595 (6th Cir. 1968); *N.L.R.B. v. Johnnie's Poultry Co.*, 344 F. 2d 617 (8th Cir. 1965); *Don the Beachcomber v. N.L.R.B.*, 390 F. 2d 344 (9th Cir. 1968); see "Union Authorization Cards and the Duty to Bargain", an address by NLRB Associate General Counsel, H. Stephan Gordon (February 15, 1968), 67 LRR 165.

[7]Section 7 of the Act, see Appendix.

by requiring unions to have a majority support as a condition of their right to bargain.[8]

In fostering collective bargaining, the Board is sacrificing the rights of employees guaranteed by the Act "to bargain collectively through agents of their own choosing"[9] As stated in *N.L.R.B. v. Mayer,* 196 F. 2d 286 (5th Cir. 1952), "Under Secs. 1 and 7 of the Act, the employees have the right 'to bargain collectively through representatives of their own choosing'. They have the right to revoke. *N.L.R.B. v. Hollywood-Maxwell Co.,* (CA-9), 126 F. 2d 815, headnotes 7 and 9." (*Id.* at 289.) In the *Mayer* case,[10] the em-

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[8]Section 9(c) of the Act, see Appendix. *N.L.R.B. v. Hollywood Maxwell Co.*, 126 F. 2d 815 (9th Cir. 1942); *Glendale Mfg. Co. v. Local 520, I.L.G.W.U.*, 283 F. 2d 936 (4th Cir. 1960). In *Garment Workers v. N.L.R.B.*, 366 U.S. 731, 81 S. Ct. 1603 (1961), the Court found that an employer's good faith grant of recognition to a union when it actually did not represent a majority of the employees was an unfair labor practice.

[9]Section 7 of the Act, see Appendix.

[10]The *Mayer* case has been distinguished in two of the cases relied on by the Board. In *Brooks v. N.L.R.B., supra,* the Supreme Court said,

> "Both before and after the Taft-Hartley Act, the Board and the courts did not apply the rule to a collective bargaining relationship established other than as a result of a certification election. E.G. Joe Hearin, 66 N.L.R.B. 1276 (card-check); Labor Board v. Mayer, 196 F.2d 286 (C.A. 5th Cir.) (card-check) . . .". (348 U.S. at 101)

And in *N.L.R.B. v. Universal Gear Service Corp.,* No. 17, 699 (6th Cir.), decided May 16, 1968, the court said,

> "In addition, it cannot be said that the Board's determination favoring stability of bargaining relationships should, in this case, yield to a countervailing consideration of the employees' right to freedom of choice of bargaining representative, since the record here does not disclose that a majority of the employees in the bargaining unit has rejected the union. Cf. N.L.R.B. v. Mayer, 196 F. 2d 286 (5th Cir. 1952)."

ployer voluntarily recognized a union after nine of his eleven employees signed authorization cards. Two weeks later after two bargaining meetings, seven of the company's employees signed a petition repudiating the union. The company then petitioned the Board for a representation election. After two more bargaining meetings, the company refused to meet with the union again. Seven months later, the Board denied the company's petition for an election. The court refused to enforce the Board's Order, saying,

> "Here the employees first chose the Union, then repudiated it, as their representative. Through opposing the Union, respondent has endeavored to follow the expressed wishes of his employees. There appears here no effort on the part of the employer to subvert statutory processes, nor to defeat the functioning of the Board. It should be borne in mind that the employees, not the employer, are the actors in repudiating this Union. If we should compel respondent to bargain further with this Union, which the employees themselves have obviously repudiated, the result would be to deny them the right, secured by the Act, to bargain through the representative of their choice. The choice has here been made by the employees in a manner that does not admit of dispute. When as here, the employer's recognition of the bargaining representative is not based upon a certification by the Board but is wholly voluntary and informal, we see no reason why the employer cannot also accede to the wishes of seven out of his then ten employees, and discontinue with it." (*Ibid.*)

Where there has been a court decree, a Board order, or a settlement agreement requiring a company to bargain, it will be required to bargain with the union for a reasonable period of time. The reason for bargaining, in these cases, is not to insulate the union from the changed desires of the employees, but to remedy the unfair labor practices of the employer against the union and the employees. As stated in a case relied upon by the Board,

> ". . . the settlement agreement clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act. . . ."
>
> *Poole Foundry & Machine Co. v. N.L.R.B.,* 192 F. 2d 740, 743 (4th Cir. 1951) cert. denied, 342 U.S. 954.

In *Franks Bros. Co. v. N.L.R.B.,* 321 U.S. 702, 64 S. Ct. 817 (1944), the company had wrongfully refused to bargain with a union which had represented a majority of its employees. The Board found that

> "the only means by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed." 44 NLRB 898, 917.

The Supreme Court enforced the Board Order, holding that

> ". . . where a union's majority was dissipated after an employer's unfair labor practices in refusing to bargain, the Board could appropriately find that such conduct had undermined the prestige of the

> union and require the employer to bargain with it for a reasonable period despite the loss of majority."[11]

The facts show that after the Company voluntarily recognized the Union and bargained with it, a majority of the Company's employees repudiated it. At no time has the Company attempted to bargain in bad faith or to undermine the Union. The employees after informally choosing the Union have determined that they do not wish to be represented by it. The Board's Order requiring the Company to bargain denies them the right, guaranteed by the Act, to bargain through the representative of their choice, and therefore the Board's Order should not be enforced.

Conclusion.

For the reasons stated, Respondent respectfully submits that the Board's Order should not be enforced.

Resepctfully submitted,

VAN DE WATER, POWELL & PATERSON,
By LEE T. PATERSON,
Attorneys for Respondent.

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[11] *Brooks v. N.L.R.B.*, 348 U.S. 96, 75 S. Ct. 176 (1954).

Certification.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEE T. PATERSON

APPENDIX.

"Short Title and Declaration of Policy"

Section 1.

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * * *

"Rights of Employees"

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * *

"Representatives and Elections"

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

"(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective

bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

No. 22,715

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TERRY COACH INDUSTRIES, INC.,
Respondent.

On Petition for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.
FRANKLIN C. MILLIKEN,
Attorneys,

National Labor Relations Board

THE CASILLAS PRESS, INC. – 1717 K Street, N. W. – Washington, D. C. 20006

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No. 22,715

NATIONAL LABOR RELATIONS BOARD,

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v.

TERRY COACH INDUSTRIES, INC.,

Respondent.

On Petition for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat.

136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 19-20, 28)[2] issued against respondent on June 30, 1967. The Board's decision and order are reported at 166 NLRB No. 76. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in El Monte, California where respondent is engaged in the manufacture and distribution of travel trailers. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(1) of the Act by refusing to reinstate employee Willie H. Smith at the conclusion of a protected economic strike in which he took part. The underlying facts are as follows:

On May 3, 1966, a number of the Company's employees went on strike to obtain higher wages (R. 11; Tr. 4, 7-12). On the same day, the advice of the Union[3] was sought and picket signs were later obtained at the union hall (R. 11; Tr. 14-15, 18-19). Picketing began the next day (R. 2; Tr. 20).

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[1] Pertinent provisions of the Act are set forth in Appendix B, *infra,* p. B-1.

[2] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Industrial Carpenters Union, Local 530, United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

On May 4, several of the pickets stopped a lunch truck, which serviced the employees in the plant, as it emerged through the main gate of the plant (R. 11; Tr. 29-30). While the truck was stopped the driver had a conversation with Smith and another employee during which Smith was heard to say "You better not come back tomorrow, you chicken shit" (R. 11; Tr. 74-75, 87). Thereafter someone shouted that Production Manager Brewster was calling the police and the pickets moved aside and the truck left (R. 11; Tr. 108).

About 7:30 a.m. on the morning of May 5, a group of six or eight strikers, including employees Smith, Vincent and McKee, were picketing in an alleyway leading to a parking lot in back of the Company's plant (R. 14; Tr. 57). When employee Rakow approached the picket line the pickets moved out of his way and he proceeded through the line to the parking lot (R. 14; Tr. 58). As he passed through the line he heard a voice, which he recognized as Smith's, call him a "bastard" (R. 14; Tr. 58).

On the same day, Manager Brewster was informed by his assistant that the Hare Window Company had advised him by telephone that pickets had refused to permit their truck to enter the plant (R. 15; Tr. 103). The assistant, on Brewster's instruction, requested Hare Window to instruct its driver, then a block from the Company's plant, to return (R. 15; Tr. 128). When the truck returned the pickets stopped it again (R. 15; Tr. 129), Brewster went over to the truck and told the driver to proceed (R. 15; Tr. 103-104). When the driver did so all of the pickets except Smith stepped aside (R. 15; Tr. 104). When Brewster told Smith to "move or else" Smith stepped aside and the truck proceeded into the plant (R. 15; Tr. 104).

On May 11, on advice of the Union, the strikers, including Smith, presented themselves at the Company's plant and unconditionally offered to return to their jobs

(R. 11; Tr. 25-26). They were told by the Company that they would be notified as soon as places could be found for them at the plant (R. 11; Tr. 25-26). That evening Smith received a telegram from the Company notifying him that he had been discharged because of misconduct during the strike (R. 11; Tr. 26-27). The parties stipulated that Smith had not been replaced at the time he sought reinstatement (R. 11; Tr. 4).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by denying re-employment to Smith at the conclusion of the strike. In so ruling, the Board agreed with the Trial Examiner that Smith's conduct on the three occasions set forth above were nothing more than "rough trivial incidents" which frequently occur during strikes over vital economic issues and was not sufficiently serious to warrant depriving him of the statutory protection against discharge. The Board's order requires the Company to cease and desist from the unfair labor practice found, to offer Smith reinstatement and backpay, and to post an appropriate notice (R. 19-20, 28).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING STRIKER SMITH AT THE CONCLUSION OF A LAWFUL STRIKE, SINCE SMITH HAD ENGAGED IN NO MISCONDUCT DURING THE STRIKE WHICH WOULD WARRANT A FORFEITURE OF THE NORMAL STATUTORY PROTECTION

Section 7 and 13 of the Act grant employees the right to strike, picket, and engage in other "concerted activities for the purpose of collective bargaining or other mutual

aid or protection." Settled law, therefore, prohibits an employer from discharging economic strikers or denying them reinstatement at the conclusion of a strike, unless they have been previously replaced.[4] It is undisputed in this case that the Company discharged striker Smith at the conclusion of the strike and that Smith's job had not previously been filled. The Company contends, however, that Smith engaged in misconduct on the picket line in May 1966 which justifies the refusal to reinstate him.

It is true, of course, that not all forms of conduct literally within the terms of Sections 7 and 13 remain entitled to statutory protection. In deference to the rights of employers and the public, the Board and the courts have acknowledged that some forms of misconduct occurring in the course of a strike disqualify the striker from protection against discharge. Thus, strikers have been deemed to lose the Act's protection where they seized the employer's property (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240), or engaged in acts of "brutal violence" against a non-striker (*N.L.R.B. v. Kelco Corp.*, 178 F.2d 578 (C.A. 4)).

At the same time, it is clear that not every impropriety committed in the course of a strike deprives the employee of the protective mantle of the Act. It has long been held that minor acts of misconduct "must have been in the contemplation of Congress when it provided" for the right to strike. *Republic Steel Corp. v. N.L.R.B.*, 107 F.2d 472, 479 (C.A. 3). As was stated in *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 815-816 (C.A. 7):

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[4] *N.L.R.B. v. MacKay Radio & Tel. Co.*, 304 U. S. 333, 344-346; *N.L.R.B. v. Globe Wireless Ltd.*, 193 F.2d 748, 750 (C.A. 9); *N.L.R.B. v. McCatron*, 216 F.2d 212, 215 (C.A. 9), cert denied, 348 U.S. 943 *Phaostron Co.*, 344 F.2d 855, 858-859 (C.A. 9).

> [C]ourts have recognized that a distinction is to be drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct 'in a moment of animal exuberance' (*Milk Wagon Driver Union v. Meadow-Moor Dairies, Inc.*, 312 U. S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employees unfit for further service [citations omitted], and that it is only in the latter type of cases that the courts find that the protection of the rights of employees to full freedom in self-organizational activities should be subordinated * * *.

And as the Court of Appeals for the Seventh Circuit has further held (*N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587):

> The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect * * * Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed.

On the facts of record, it is submitted, the Board was fully justified in concluding that Smith's misconduct was not of a sufficiently serious nature to render him unfit for further service in the Company's plant. None of the three incidents found by the Trial Examiner involved physical violence or destruction of property. The brief stoppage of the Hare truck; the threat, never carried out, to the lunch truck driver; and the obscene remarks made to the lunch truck driver and to employee Rakow after

he had crossed the picket line are typical of the "trivial rough incident" or the "moment of animal exuberence"[5] which frequently characterize picket lines particularly where, as here, there are vital economic issues at stake and the striking employees are quite naturally incensed at those who cross the picket line.[6]

Moreover, it is manifest from the Company's own conduct that it did not attach any great importance to such incidents. Thus the Company recalled two other strikers, Vincent and McKee, although it believed that both had participated in the blocking of nonstriking employees attempting to enter its plant (R. 17; Tr. 44-46). And the Company's sole reason for distinguishing between the reinstatement of Vincent and McKee and the refusal to reinstate Smith was not because of any distinction drawn with

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[5] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,* 312 U. S. 287, 293.

[6] In addition to the three instances of misconduct which the Trial Examiner found, the Company contended that Smith engaged in other acts of misconduct during the strike which justified its refusal to reinstate him. The Trial Examiner's findings were based on his observance of the demeanor of the witnesses and a careful analysis of their testimony. In the three incidents in which he found Smith had engaged in misconduct the Trial Examiner credited the Company's witnesses; where he found that Smith had not engaged in misconduct he credited Smith's denials that the events had occurred. The Board specifically approved of these credibility findings of the Trial Examiner (R. 27). It is well settled that such credibility determinations are peculiarly within the province of the Board and the Trial Examiner and should rarely be disturbed on review. *N.L.R.B. v. Luisi Truck Lines,* 384 F.2d 842, 846 (C.A. 9); *N.L.R.B. v. Local 776 IATSE,* 303 F.2d 513, 518 (C.A. 9), cert. denied, 371 U. S. 826; *N.L.R.B. v. Stanislaus Implement & Hardware Co.,* 226 F.2d 377, 381 (C.A. 9).

regard to the extent of their participation in the blocking of egress to the plant, but because McKee and Vincent were not heard to use profanity (R. 17; Tr. 45). Clearly, such a tenuous distinction lends little credence to the Company's contention that its refusal to recall Smith was motivated by his unfitness for further service in its plant.

For these reasons, the Board's determination that Smith's misconduct did not warrant a forfeiture of his statutory protection was, we submit, a reasonable and appropriate judgment. In similar cases, the courts have affirmed such a result. *Thor Power Tool Corp., supra,* 351 F.2d at 587 (alternate holding); *N.L.R.B. v. Wichita Television Corp.,* 277 F.2d 579, 585 (C.A. 10), cert. denied, 364 U. S. 871; *N.L.R.B. v. J. Mitchko, Inc.,* 284 F.2d 573, 577 (C.A. 3); *N.L.R.B. v. Efco Mfg. Co., Inc.,* 227 F.2d 675, 676 (C.A. 1), cert. denied, 350 U. S. 1007; *N.L.R.B. v. Cambria Clay,* 215 F.2d 48, 54 (C.A. 6); *N.L.R.B. v. Longview Furniture Co.,* 206 F.2d 274, 275-276 (C.A. 4); *N.L.R.B. v. Coal Creek Coal Co.,* 204 F.2d 579, 581 (C.A. 10); *N.L.R.B. v. Wallick,* 198 F.2d 477, 484-485 (C.A. 3); *Kansas Milling Co. v. N.L.R.B.,* 185 F.2d 413, 420 (C.A. 10); *Illinois Tool Works, supra,* 153 F.2d at 815-816; *Republic Steel Co., supra,* 107 F.2d at 479; *N.L.R.B. v. Stackpole Carbon Co.,* 105 F.2d 167, 176 (C.A. 3), cert. denied, 308 U. S. 605.

CONCLUSION

For the reasons stated, the Board's order should be enforced in full.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST
Assistant General Counsel,
ALLISON W. BROWN, JR.,
FRANKLIN C. MILLIKEN,
Attorneys,
National Labor Relations Board

June 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board

APPENDIX A

Pursuant to Rule 18(a)(f) of the Rules of this Court: Exhibits in the instant case.

(Page references are to the transcript of testimony):

General Counsel's Exhibits

No.	Identified	Received in Evidence
1(a) through 1(h)	4	4

* * *

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

LIMITATIONS

Sec. 13. Nothing in this Act, except as specially provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

No. 22,715

IN THE

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NATIONAL LABOR RELATIONS BOARD,

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vs.

TERRY COACH INDUSTRIES, INC.,

Respondent.

BRIEF FOR RESPONDENT.

GIBSON, DUNN & CRUTCHER,
HUGH J. SCALLON,
1010 North Main Street,
Santa Ana, Calif. 92701,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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vs.

TERRY COACH INDUSTRIES, INC.,

Respondent.

BRIEF FOR RESPONDENT.

Jurisdiction.

Respondent accepts Petitioner's jurisdictional statement.

Statement of the Case.

A. The Background of the Strike.[1]

On the afternoon of May 3, 1966, certain of the employees of Terry Coach Industries, Inc. (hereinafter "Terry") went out on a spontaneous strike, basically over the issue of wages. There were no prior negotiations nor any prior union organizational efforts [R. 11; Tr. 136]. The strike lasted until May 10, 1966 [R. 11; Tr. 24].

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[1]References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Company had information concerning misconduct of many strikers, but based on the degree of misconduct refused to rehire only six persons named in Exhibit "A", of which the complainant Willis Smith (hereinafter "Smith") was one [Tr. 105-107].

B. Background of the Complainant Smith.

Smith was a leadman in the Metal Department [R. 10; Tr. 6], leading from twenty-five to thirty-five employees [Tr. 9]. As such, he was paid a thirty-cent an hour premium [Tr. 33]. As leadman, Smith had spoken regularly with the Production Manager, Charles Brewster (hereinafter "Brewster") many times on personnel matters involving his department, in the same manner as all of the other leadmen in the plant [Tr. 7 and 32], but by his own statement was not in any way prominent as a spokesman. There is some question whether he spoke to Brewster on the day of the strike [Tr. 7 and 98], but in any event at least one other leadman, who was rehired, did the same thing [Tr. 9 and 111].

C. No Evidence of Company Antiunion Animus.

The Company was not charged with, nor is there an iota of evidence of Company antiunion animus. There is absolutely no evidence that the Company discriminated against persons who acted as spokesmen for the employees. In fact, it affirmatively appears that the employer did reinstate persons who acted much more prominently as spokesmen for the employees, in particular Bob Vincent [Tr. 98-99, lines 23-11].

D. Misconduct Proven to the Satisfaction of the Trial Examiner.

The Trial Examiner found that the complainant, Willis Smith, engaged in the following misconduct:

1. He threatened the lunch wagon driver with physical harm if he returned to the plant and called him an obscene name, "chicken shit" [R. 12, lines 27-40].

2. He called a subordinate Rakow a "bastard" for crossing the picket line [R. 15].

3. He blocked a vendor truck access to the plant [R. 15, lines 35-39].

E. Misconduct Not Found by the Trial Examiner but Conclusively Shown in the Record.[2]

In addition to the misconduct found by the Trial Examiner, the record contains conclusive evidence of the following additional incidents of misconduct.

1. *Threats to Rakow.* Arthur Rakow was an employee in the department of which Smith was the leadman [Tr. 65, lines 12-13]. Rakow had gone out on strike the first day, May 3 [R. 13; Tr. 55]. However, he returned to work on Wednesday, May 4. When he came out of work, he found that one tire of his car had been slashed, and the other punctured [R. 13; Tr. 55-56]. While he was working on his tires, Smith and another striker who was not reinstated, Tony Jovee. approached him. Smith called him a "bastard and a son-

---

[2]The brief for Petitioner states that the Trial Examiner made "a careful analysis" of the testimony (Brief, p. 7, footnote 6). The evidence quoted in the text above will show just how "careful" this analysis was.

of-a-bitch," and Smith threatened to get him unless he went out on strike [Tr. 56, 68-70]. The Trial Examiner's reasons for refusing to credit the testimony of Rakow are:

(a) "Rakow's conflicting testimony as to whether Smith called him names on May 4" [R. 14, lines 1-2]. The Trial Examiner cited no conflicts, and Respondent can find no conflict on this point whatsoever. One cannot point out "where it does not say that in the record," but Rakow's testimony can be read [Tr. 56-57; 67-70].

(b) "[Smith's] frequent use of the passive tense without naming Smith" [R. 14, lines 2-3]. Rakow did sometimes use the passive tense, but his meaning was never unclear. See, *e.g.:*

"A. I was called such as a bastard and a son of of a bitch, and I had better walk out on the strike or they were going to get me.

Q. Who made these remarks?

A. Some were made by Willis Smith, and some were made by Tony, and a few other people that had walked up.

Q. Which ones were made by Willis Smith?

A. He said they would finally wind up getting me, if I didn't walk out on the strike." [Tr. 56-57, lines 23-6].

"Q. Was anything said as you passed through the line?

A. I heard one voice hollered I was a bastard.

Q. Did you recognize who made that remark?

A. Willis Smith." [Tr. 58, lines 10-13].

"Q. And you heard Willis Smith say, 'I am going to get you, you son of a bitch,' or what did you hear him say?

A. I was sworn at.

Q. Were you looking at Willis Smith when you were sworn at?

A. No, but I recognized his voice." [Tr. 64, lines 16-20].

The Trial Examiner's rejection of the testimony of Rakow on the grounds that he "tended to use the passive tense" amounts to friviolity. The Trial Examiner himself stated that the language of industrial relations is not necessarily the language of "polite society." [R. 17, lines 46-47]. However, he apparently expects a production employee to be aware of the prejudices of creative writing instructors against use of the passive tense. There never was any question as to whom Rakow was indentifying.

In addition, the Trial Examiner disregarded the threat because "the record does not establish that Rakow told any representative of Respondent about the incident prior to the refusal to reinstate Smith." [R. 14, lines 7-8]. The record could not be clearer to the contrary. Brewster made the decision not to reinstate Smith. His testimony was as follows:

"Q. Now, we have heard testimony this morning that Willis Smith threatened a lunch wagon driver, threatened Art Rakow, blocked nonstriking employees from entering the plant. Were you aware of these incidents at the time you made the decision to not employ Willis Smith?

A. Yes, I was." [Tr. 105-106, lines 25-5].

2. *Obscene Names to Female Employees.* At the end of the work shift on the first full day of the strike, Production Manager Brewster was standing in front of the plant about 6 to 12 feet from Smith [Tr. 100, lines 9-11; 115, lines 7-9]. Smith, within three feet of several female employees called them "broad asses" and "bitches" in various combinations of language [Tr. 100, lines 22-24; 114-115, lines 20-3].

Brewster's testimony as to the language used was absolutely positive, as was his identification of Smith. The reasons given by the Trial Examiner for refusal to credit Brewster's testimony are as follows:

> (a) "It seems unlikely that Smith would make insulting remarks to female employees in the presence of Sheriff's Deputies" [R. 13, lines 29-30]. First, this is factually incorrect. This incident took place at the mouth of the alley [Tr. 100, lines 4-8] while the deputies were at the gate [Tr. 113, lines 10-11] which is about 50 to 60 feet away [Tr. 41, lines 9-10]. Second, this constitutes pure speculation and in fact the Trial Examiner found that Smith called a fellow striker "bastard" on an occasion when the Sheriff's Deputies were present, i.e., when Smith was engaged in blocking access to the plant [R. 14, lines 33-35; R. 15, lines 17-19]. Third, on whether it is likely Smith used this language, the Trial Examiner found he used equally obscene language earlier in the day to the lunch wagon driver [R. 12, lines 26-31].
>
> (b) "Brewster evidenced some unreliability in his testimony regarding his recognition of the employee standing beside Smith" [R. 13, lines 31-32].

The Trial Examiner does not explain in any way why the fact that Brewster could not identify another person who was not facing him proved that he could not recognize Smith who was standing only six feet from him in profile. Brewster knew Smith well, was his immediate superior, and had numerous conversations with Smith. There is absolutely no basis in the record to doubt his identification of Smith [Tr. 101, lines 4-10]. As to the employee standing next to Smith, Brewster merely testified that he could not see the face of the other individual and that in any event he was engaged in watching Smith at the time [Tr. 113, lines 18-25].

(c) Brewster's testimony "was not corroborated by the employees to whom it [the obscene remark] was allegedly addressed" [R. 13, lines 33-34]. As to this argument, it should be noted, first of all, the Trial Examiner has been completely inconsistent in that he has repeatedly accepted the testimony of the complainant without corroboration, though by the complainant's own admission such corroboration was available. As to the only issue on which the complainant chose to present corroboration, the Trial Examiner found against the complainant. But more important, as is made clear in probably the leading book on evidence, *"credibility does not depend on numbers of witnesses."*[3] To require the employer to summon every witness to an incident on pain of losing on the issue of credibility will only go to infinitely stretch out the time involved in the hearing of these matters. Further,

[3]Wigmore, *Evidence,* § 2034 (3d ed. 1940).

in this case, to add to the undesirability of compelling one member of the work force unnecessarily to testify against another, it would require women employees to give extremely embarrassing testimony. Corroboration was not necessary. The testimony of the Company witness Brewster, was absolutely certain.

3. *Blocking of Nonstriking Employees' Access to the Plant.* Another incident which the Trial Examiner refused to credit involved blocking by Smith and other striking employees of access to the Company parking lot. Access to the parking lot is obtained by a long, narrow alley approximately 10 feet wide. On the south side of the alley, the Terry Coach office building is immediately adjacent to the alley. The other side of the alley is relatively open, blocked at points by poles, but is the property of the neighboring plant [Tr. 37-38, 49-51].

Assistant Production Manager, Wayne George, supervised Smith and knew him well. George testified that on the morning of May 5, Smith and six to eight other strikers were massed in this ten-foot wide alley [Tr. 38, 43-44], completely blocking it [Tr. 42-43]. It was necessary to ask the police to clear the way [Tr. 46, lines 10-16]. Specifically, one employee was able to obtain access to the plant only by literally forcing his way through the picket line, and another was forced to drive his car over the property of the adjacent landowner [Tr. 38, 58]. In the course of this blocking, Smith called non-strikers Rakow and Pearl a "bastard" and a "son of a bitch" and threatened them [Tr. 39, 51]. The testimony of George was corroborated fully

by Rakow [Tr. 57-58, 59-66]. Smith admitted being present at the plant on this morning and even seeing Pearl come into work but denied blocking [Tr. 139-140]. Smith said "A lot of times I would walk back and forth across the entrance, real slow like" [Tr. 28, lines 5-6].

The Trial Examiner refused to find Smith guilty of this misconduct due to lack of credibility of the principal witness, George [R. 15, lines 7-14]. The Trial Examiner concluded that George's testimony was unreliable first because while George testified that the pickets blocked the alley, he also admitted that they would finally move when cars forced their way through [R. 15, lines 6-8]. There is nothing conflicting in this testimony. As discussed below, the cases hold blocking is established even though ultimately access is obtained.

The Trial Examiner further discredited George's testimony because George apparently misspoke and identified Rakow as the non-striking employee forced to trespass on neighboring land on one occasion [R. 15, lines 8-10; Tr. 38, lines 19-20], but identified the person involved as Pearl later on [Tr. 48, lines 22-25]. This single discrepancy as a basis for discrediting testimony is ridiculous in that the record clearly shows that the identity of the persons involved was merely stated in passing, was not considered important, and was not in any way made the subject of further examination or cross-examination by counsel to clarify the identity of the non-strikers involved [see *e.g.,* Tr. 38, lines 19-20; 48-49; lines 22-6; 50, lines 18-19; and 51, lines 19-22].

4. *Attempts to Pick Fights.* Although Brewster testified unequivocally that Smith cursed and invited nonstriking employees to come out and fight [Tr. 102, 118, 120, 124 and 127], and Smith himself admitted that he "hollered in there a few times for some of them to come on out and join us, but not to fight" [Tr. 27, lines 20-24], the Trial Examiner refused to find any misconduct on the part of Smith because the name of the specific employees threatened was not given and Rakow did not corroborate Brewster's testimony. To hold that the threats were not proven because the name of specific employees was not given indicates complete misunderstanding of the testimony. Brewster testified that these threats were made to the work force in general [Tr. 102-103, lines 1-1; 127, lines 8-15].

5. *Lack of Corroboration.* A significant hiatus in the record should be noted. With the exception of the coffee truck incident, as to which Smith produced as a witness his half-brother, Smith did not produce a single corroborating witness, though he testified that at no time was he on the picket line alone, and therefore without benefit of a witness [Tr. 34]. It should be noted that the Trial Examiner did not believe the corroborating witness who was called.

ARGUMENT.

The ultimate issue in this cause is whether there is substantial evidence in the record viewed as a whole to support the decision of the Labor Board that Smith was entitled to reinstatement. A preliminary determination, however, must be made of exactly what misconduct he engaged in. The Board found that he:

1. Threatened a lunch wagon driver and called him obscene names;
2. Called a subordinate an obscene name; and
3. Blocked a vendor's truck.

Respondent has pointed out that the record conclusively showed the following additional acts:

1. Threatening a subordinate;
2. Calling female clerical employees obscene names;
3. Blocking employee access to the plant; and
4. Threatening and attempting to pick fights.

Petitioner attempts to airily dismiss the latter incidents in a footnote on the grounds that they involved credibility and the demeanor of the witnesses and that this determination is peculiarly within the discretion of the Trial Examiner. The Labor Board's own decisions refute this argument. The Trial Examiner here at no point relied on demeanor as a reason for crediting or discrediting testimony, but rather cited (albeit incorrectly) objective evidence in the record. Under these circumstances, the Labor Board itself attaches no significance to the finding of the Trial Examiner. In *Poinsett Lumber and Manufacturing Company*, (1964) 147 N.L.R.B. 1197, 1198, the Board stated that the policy behind attaching great weight to the Trial Ex-

aminer's determination of credibility is that "by virtue of his direct observation of witnesses at the hearing [the Trial Examiner] has the opportunity to observe and evaluate factors of appearance and demeanor of witnesses." However, the Board went on to state that "therefore, insofar as credibility findings are based upon factors other than demeanor, in consonance with the policy set forth in *Standard Dry Wall Products, Inc.,* the Board will proceed with an independent evaluation."

Similarly, in *R. & R. Screen Engraving, Inc.,* (1965) 151 N.L.R.B. 1579, 1582, fn. 7 the Board stated "where, as here, it is clear that the Trial Examiner's credibility finding is based on a statement of record rather than on the demeanor of witnesses, the Board deems itself equally competent to resolve questions of credibility."

As to the function of Courts of Appeal in this situation, it was stated in *N.L.R.B. v. Florida Steel Corp., (Tampa Forge & Iron Div.),* (5th Cir. 1962) 308 F. 2d 931, 936:

> "However, we do not read Walton to say that the Examiner's and Board's findings as to credibility must be accepted no matter how implausible they may be. This cannot be so, since the Board can reject the Examiner's findings, [cite omitted] and this Court reviews the same cold record as the Board."
>
> *N.L.R.B. v. Florida Steel Corp. (Tampa Forge & Iron Div.,* (5th Cir. 1962) 308 F. 2d 931, 936.

As shown above, the Trial Examiner simply and plainly made errors. He stated that there was no testimony where the testimony was unusually explicit. He claimed inconsistencies, but cites no conflicting testimony. *It is extremely significant that these errors in the analysis of the transcript were the subject of explicit exceptions to the determination by the Trial Examiner, but that Petitioner has not made the slightest attempt here to rehabilitate or sustain the Trial Examiner in this regard.* By a reply brief before the Labor Board, some slight effort to do so was made, but the result was preposterous and the Court is invited to evaluate it.

Smith Was Properly Denied Reinstatement Even if He Engaged Only in the Acts of Misconduct Found by the Trial Examiner.

Cases dealing with whether an employer is justified on certain facts in refusing to re-employ a striker for misconduct are practically infinite in number, and the particular acts of misconduct passed upon occur in virtually infinite combinations. The Trial Examiner stated the test to be whether the misconduct "is so violent or of such serious character as to render the employee unfit for further service" (*N.L.R.B. v. Illinois Tool Works,* (7th Cir. 1946) 153 F. 2d 811, 815-816), or whether it merely constitutes "a trivial rough incident" occurring in "a moment of animal exuberance" *(Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,* (1941) 312 U.S. 287, 293).

The facts in this case are as follows: The complainant was a leadman, paid a premium rate of pay to be in charge of a specific area of the plant. There

were no prior negotiations involved to raise the temper of the employees or in any way to justify a reprisal. Except for the charge herein involved, it was neither alleged nor proved that the employer had any anti-union animus. Misconduct was of such a degree that the employer refused to re-employ six employees, and though a charge was filed as to all six, a complaint was issued only as to one. Thus at most the employer is charged with having made a mistake as to a specific individual in the context of general misconduct.

Respondent submits that to direct it to reinstate the complainant in the light of the proven misconduct would create an impossible personnel problem in the plant. Complainant is supposed to supervise individuals that he has been found by the Trial Examiner to have called obscene names. He threatened and used obscene names towards other employees, including females. He interfered with vendors dealing with respondent. To permit this man back into the plant with all back pay and full status is to place a premium on misconduct. Again it should be emphasized that there was absolutely no justification for the misconduct. The complainant was engaging in misconduct when the strike was less than 24 ours old, and continued it for days.

Respondent takes strong exception to the portion of the Trial Examiner's opinion which suggests that because respondent did not discharge every employee who used profanity or obscenities, respondent may not consider such language as part of a sum total of conduct justifying discharge [R. 8, lines 35-45]. Such opinions only go to force employers to fear to achieve justice for fear of being chastised as inconsistent.

Board precedent fully supports the respondent's position. The cases are too numerous to attempt to set forth, so respondent will set only two cases out at length, and cite others reasonably analogous:

In *Brookville Grove Company,* (1955) 114 N.L.R.B. 213, *enforced sub. nom. N.L.R.B. v. Leach,* (3d Cir. 1956) 234 F. 2d 400, the employer had itself committed an unfair labor practice. Nevertheless the Labor Board upheld the employer in its refusal to rehire four strikers in the following language:

> "The Trial Examiner found that these 4 complaining strikers threatened nonstrikers with acts of violence on 2 occasions. According to testimony of management representatives which the Trial Examiner credited, about a week after the strike began, just after some strikers had returned to work, the four complainants in question, while stationed on the picket line in front of the Respondents' plant, brandished their fists and shouted to the nonstrikers, who were engaged at work inside the plant, that the strikers would 'kill' them.
>
> "About a week later, the same four strikers, while on the picket line, shouted, in substance, as employees were reporting for work at that plant, that the strikers would have help the next day and would enter the plant and throw out the nonstrikers.
>
> "While not condoning these statements, the Trial Examiner characterized them as 'idle threats not implemented in any way.' It is true that no violence occurred. However, if these threats of violence had been made by agents of a labor organiza-

tion, they would amount to conduct which, in an appropriate proceeding, might properly be viewed as violative of Section 8(b)(1)(A) of the Act. We believe that the conduct of the four complainants in question exceeded permissible bounds, and shall therefore not order reinstatement or back pay for them."

Brookville Glove Company, 114 N.L.R.B. 213, 214-215.

The Labor Board has also held that blocking, whether or not successful, is grounds for denial of reinstatement, making clear that basing the decision on whether or not the blocking is successful would be unsound policy. In *The American Tool Works Company,* (1956) 116 N.L.R.B. 1681 the Labor Board stated:

"Thus the Trial Examiner found that when Harris, a junkyard truck driver, came to the plant for a load of scrap, Hudson stepped in front of Harris' truck at the plant gate and barred its entrance during the period of time that another picket came to the side of the truck and engaged Harris in conversation. The precise nature of the conversation is not clear, but Harris, in any event, did not attempt to enter the plant. After first phoning his employer, he drove away. The record permits of no other interpretation, we believe, than that by placing himself before the truck, in the plant gate, Hudson physically and forcibly blocked entrance to the plant for the period necessary to dissuade the driver of the truck from entering. Unlike our dissenting colleague, we cannot regard such an act as divorced from all implication of a threat of physical violence. And such an implica-

tion is obviously not negated or lessened merely by virtue of the fact that the driver elected not to test the apparent threat by attempting to enter, but was soon dissuaded and turned away. Therefore, especially in view of Hudson's blocking of the plant entrance to Harris' truck, and also because of his participation, along with other employees likewise found to have been properly denied reinstatement by the Respondent, in shouting profanities through the plant windows at non-striking employees, we, as did the Trial Examiner, find that the Respondent did not, by discharging and refusing to reinstate Henry W. Hudson thereby violate the Act."

The American Tool Works Company, 116 N.L.R.B. 1681, 1682.

The following cases sustain denial of reinstatement on reasonably analogous facts:

Valley Die Cast Corp., (1961) 130 N.L.R.B. 508, 509, *enforced,* (6th Cir. 1962) 303 F.2d 64;

Waycross Machine Shop, (1959) 123 N.L.R.B. 1331, 1335, *enforced sub. nom. N.L.R.B. v. Dell,* (5th Cir. 1960) 283 F.2d 733;

The Rivoli Mills, Inc., (1953) 104 N.L.R.B. 169, 171, *enforced,* (6th Cir. 1954) 212 F.2d 792;

Intertown Corporation (Michigan), (1950) 90 N.L.R.B. 1145, 1150.

The Trial Examiner distinguished the above cases as to threats as "not apposite, since they involved threats of serious violence" [R. 7, lines 39-40]. Smith told Rakow "they were going to get [him]" [Tr. 56, lines

23-25]; he told the lunch wagon driver "you better not come back tomorrow, chicken shit" [Tr. 75, lines 4-5; 87, lines 19-20]; he shouted at nonstrikers "you son-of-a-bitch, come out here and fight like a man" [Tr. 102, 5-6]. This certainly threatens serious violence.

The Trial Examiner lightly dismissed threats, obscenities, and blocking of plant access as "rough trivial incidents" [R. 9, line 13]. How can an employer possibly put a man back in charge of 35 employees some of whom he has threatened and called names, to work next to other employees he has challenged to fights, and to deal with third party vendors whom he has threatened and blocked with a pious hope that everyone concerned think the whole thing was "trivial"? Smith, without provocation of any sort, put himself in a position such that it is absolutely impossible to put him back to work.

Looking at the entire case, the position of Petitioner here is completely inconsistent. It suggests on one hand that Respondent refused to reinstate Smith because he was the leader of the strike. Smith's defense to the charges of misconduct, however is that he was not even present on most of the occasions. For example, he testified that most of the employees went back to the plant the second day, but he went home [Tr. 20, lines 9-14]. He testified he was only intermittently present on the picket line at the commencement of work [Tr. 34, lines 13-22]. Thus the Labor Board is saying for the purposes of determining our motivation, Smith was the leader but for the purposes of determining Smith's participation in misconduct, he was not even present.

Conclusion.

Wherefore, Respondent respectfully submits that this Court should deny enforcement of the decision of the National Labor Relations Board.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
HUGH J. SCALLON,
By HUGH J. SCALLON,
Attorneys for Respondent.

Dated July 11, 1968

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HUGH J. SCALLON

Nos. 22456 and 22717

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDUSTRIES, a corporation,

Appellant,

vs.

ST. REGIS PAPER COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANT.

CHRISTIE, PARKER & HALE,
and
NEWELL & CHESTER,
By ROBERT M. NEWELL,
650 South Grand Avenue,
Los Angeles, Calif. 90017,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF FOR APPELLANT.

Jurisdictional Statement.

This appeal brief is a consolidated brief from the lower court's denial of the appellant's motion for preliminary injunction [R. 530-535, Appeal 22456] and the lower court's granting of the appellee's motion for summary judgment [R. 14-30, Appeal 22717]. The lower court's jurisdiction for both of these appeals is under the provision of Title 28, U.S. Code, Sec. 1338-(a), 1338(b) [R. 14, lines 24-26]. This court's appellate jurisdiction on the denial of the preliminary injunction is based on 28 U.S.C. 1292 (A-1), the notice of appeal having been filed by the appellant within the prescribed time period [R. 534]. This court's appellate jurisdiction relative to the granting of the motion for summary judgment is under 28 U.S.C. 1291; the notice of appeal having been filed by the appellant within the prescribed time period [R. 31].

Statement of the Case.

This litigation revolves around the appellant's United States Patent No. 2,767,113, Exhibit I to the complaint [R. 2-25]. The complaint includes the license agreement between the parties to this litigation and the Plas-Ties Corporation, a wholly-owned subsidiary of the appellant at the time the complaint was filed in the lower court on July 6, 1967. The agreement between the parties appears as Exhibit II to the complaint [R. 15-25]. The agreement includes a copy of the price list of the Plas-Ties Corporation for the licensed item that was outstanding at the time the agreement was entered into [R. 25]. The license agreement between the parties licensed the appellee herein under the appellant's patent 2,767,113 and the appellant's confidential "know-how" for manufacturing plastic tie strips covered by the patent in suit. Contemporaneous with the entry into the written agreement the parties entered into an oral agreement to maintain prices on the licensed article in accordance with the prices established by the Plas-Ties Corporation [R. 51-53, 149-150].

The patent in suit U. S. 2,767,113 covers the plastic tie strips that are the subject of the license agreement between the parties and the method of manufacturing the plastic tie strips. Claim 1 of this patent covers the plastic tie strips, while the remaining claims in the patent are directed to the method of manufacturing the tie strips. The appellant is the owner of the patent in suit and the confidential know-how developed by the Plas-Ties Corporation to manufacture the tie strips. Upon entry into the license agreement, the appellee herein followed the prices maintained by the Plas-Ties Corporation on the licensed tie strips until the summer

of 1966 at which time the Pollock Paper Company Division of the appellee unilaterally reduced the prices below the minimum schedules established by the Plas-Ties Corporation [R. 54]. This breach of the oral price fixing agreement was called to the attention of the appellee's Mr. Lacy [R. 120-122, Appeal 22456] and pursuant to a conference in Los Angeles concerning this matter the prices were re-established by the Pollock Paper Company Division of the appellee [R. 124-128, Appeal 22456]. The prices were reestablished in approximately August 1966 [R. 55]. The prices were maintained by the appellee until May 1967 until, once again, there was a unilateral price reduction by appellee's Pollock Paper Division [R. 56, 130, Appeal 22456]. In view of past history, the appellant attempted to have the appellee re-establish their prices to no avail and as a result, a notice of termination of the agreement was sent to the appellee [R. 130-132] putting them on notice with respect to the breach of the oral price fixing agreement. This letter from Appellant requested that the pricing structure be re-established or the patent license and the "know-how" agreement would be cancelled and the appellee would be considered as infringing the appellant's patent rights and misappropriating the "know-how" [R. 132, Appeal 22456]. The appellee failed to comply with the appellant's request in the notice of termination and therefore the complaint was filed in this action on July 6, 1967.

The complaint charges in its first count infringement of U. S. Patent 2,767,113 and in the second count that the appellee is guilty of unfair competition in the continuous use of the appellant's know-how in the manufacture of plastic tie strips in view of the termination

of the agreement between the parties. Along with the filing of the complaint in this action the appellee filed a motion for preliminary injunction requesting that the St. Regis Paper Company be enjoined from further infringement of the patent in suit and unfair competition and misappropriation and use of the appellant's confidential know-how relative to the patented tie strips [R. 27]. The motion for preliminary injunction was denied by the court in a written opinion [R. 530].

During the course of the proceedings of the motion for preliminary injunction, the appellee filed a motion for summary judgment [R. 333, 356]. The appellee's position on the motion for summary judgment was to the effect that the license agreement between the parties was not effectively terminated and accordingly they were shielded from the claim of infringement and unfair competition by means of the license agreement. In addition, in an attempt to show that there were no genuine issues of fact for the purposes of the motion for summary judgment, the appellee took the position that the issues must be presumed as the appellant had presented them to the court but urged that evidence of the oral price fixing agreement entered into along with the written agreement was barred by the parole evidence rule [R. 339-341, Appeal 22456] and that the oral price fixing agreement violated the anti-trust laws, specifically the Clayton and the Sherman Acts. The matter of the legality of such a price fixing agreement as well as the applicability of the parol evidence rule was placed

in issue by the parties as a result of the motion for summary judgment. The lower court held with the appellee with respect to both of these matters in granting the motion for summary judgment [R. 18, 22, Appeal 22717].

Royal has appealed from the District Court's ruling for denying its request for a preliminary injunction (Appeal No. 22456) and from the ruling granting St. Regis summary judgment (Appeal No. 22717). The appeals were consolidated for the purposes of expediting the entire review of these matters.

Issue.

It is the appellant's position that at the time it entered into the written licensing agreement, St. Regis orally agreed that it set the prices it charged for the tie strips in accordance with the price list of Plas-Ties and that the failure of the appellee to comply with this oral agreement constituted a material breach of contract, entitling it to terminate the license agreement.

It was the appellee's position that the appellant's patent was invalid, and, therefore, that it would be an abuse of discretion to grant the appellant's request for a preliminary injunction. Additionally, insofar as the motion for summary judgment is concerned, it conceded for purposes of argument that the parties had entered into a contemporaneous oral agreement that St. Regis would fix its prices for the tie strips in accordance with Plas-Ties' prices but took the position that: (1) any

evidence of the contemporaneous oral agreement was barred by the California parol evidence rule; and (2) the price fixing agreement was illegal and unenforceable because of the anti-trust laws, specifically the Clayton and Sherman Acts.

Therefore, the principal issue at this state of the proceedings is whether the District Court correctly ruled that, *as a matter of law*, it was barred from taking any testimony concerning the oral price fixing agreement and whether such agreement, *again as a matter of law*, violated the Clayton and Sherman Acts.

It is the position of the appellant that the trial court was in error in refusing to hear the evidence and deciding these complex questions on summary judgment; furthermore, the court actually made factual determinations in reaching its decision; therefore, summary judgment was all the more an improper remedy.

Specification of Errors.

1. The District Court erred in holding that the California parol evidence rule barred any evidence of the contemporaneous oral agreement to fix prices and of the circumstances surrounding the making of that agreement.

2. The District Court erred in ruling as a matter of law that no authorized representative of St. Regis approved or ratified the oral agreement to fix prices.

3. The District Court erred in ruling as a matter of law that it was illegal for Royal to require St. Regis to

fix its prices for the tie strips in accordance with Plas-Ties prices.

4. The District Court erred in determining as a question of law that the "know how" was owned by Plas-Ties and/or that Royal could not validly contract to make this available to St. Regis.

5. The District Court erred in not finding that there were no material issues of fact as required by Rule 56.

6. The District Court erred in holding that, as a matter of law, the contemporaneous oral agreement to fix prices violated the Clayton and the Sherman Acts.

7. The Court abused its discretion in denying the appellant's request for a preliminary injunction to preserve the *status quo* pending a determination of the validity of the appellant's patent, the validity of the oral price fixing agreement, and the right of the appellant to terminate the license agreement because of the appellee's violation of the price fixing agreement.

ARGUMENT.

I.

The District Court Erred in Holding That the California Parol Evidence Rule Barred Any Evidence of the Contemporaneous Oral Agreement to Fix Prices and of the Circumstances Surrounding the Making of That Agreement.

On pages 5-9 of the Memorandum Decision [R. 18-22, Appeal No. 22717], the District Court elaborated its conclusion that the California parol evidence rule absolutely prohibited the Court from receiving any evidence to prove the existence of a contemporaneous oral agreement to fix prices. (Mixed in with this was some discussion about the lack of authority of the Pollack officials to enter into such an agreement). The Court clearly made a judgment on the facts on this issue, *e.g.*

> "Thus, the matter of price reduction appears to have been considered in the document, and it would seem logical to include a price fixing agreement at that point. It does not appear to this Court that parties similarly situated would make a price fixing agreement a separate agreement." [R. 21, lines 16-21, Appeal No. 22717].

One could scarcely find language more appropriate to announce a decision on a question of fact. On summary judgment, the question of what is "logical" is scarcely germane. Rather, it is what inferences most favorable to the appellant might be drawn from the evidence. There was an abundance of evidence that the parties had entered into a contemporaneous price fixing agree-

ment. For example, Mr. J. R. Johnson, the president of Royal testified at his deposition as follows:

"A Yes. Mr. Gary, the patent attorney for St. Regis, and, I believe, Mr. Lacy objected strenuously on including anything in the agreement regarding price fixing because they said that we would probably have to go to jail as it was illegal, and that they would not put anything like that into the agreement.

"Mr. Gary would not permit his client to put anything like that in the agreement. And I said, 'Well, if that is the case we simply can't reach an agreement.'

"Then Mr. Jacobs, Mr. Lacy and Mr. Gary, not once but many times, recited to me that 'While we can't put that in the agreement, you have our positive assurance at all times that we will respect your prices. *There may come a time when we may want you to drop prices, and in such event we will come to you and ask you, but if you don't think you can, and it is not the right thing to do, then we will stay with your price.*'

"And it almost got humorous because not once, but, I would say, 15 times in the course of those negotiations, both Mr. Jacobs principally, and a few times Mr. Lacy, referred to the similar understanding that they had with another company—I think it was Marathon—on another product, and that they were very ethical people, that is, Pollock, and they had always respected the other person's pricing, and that we would be fools to cut prices; they did not do that, they did not act that way, and I had their positive assurance, as businessmen

and gentlemen, that they would never cut our prices.

"Our attorneys advised me—Mr. DaRin or Mr. Hale, I don't remember which—that we could write into the agreement something to protect us on prices. And I said, 'Look, I feel that I am dealing with people who are honest. If they have a concern of this kind we don't need it in the agreement. I have absolute faith that these people are honest and that I can work with them over a long period of time. As far as I am concerned, we have a complete, positive, thorough understanding expressed by all three of them that they will at all times respect Royal's pricing.'

"Therefore, we did not write it in the agreement.

"Q. To the best of your recollection, that was the only reason that the matter of price maintenance, if you want to call it that, was not included in any draft of the agreement?

"A. Yes. It was Mr. Gary's advice to Mr. Jacobs and Mr. Lacy that he would not let them as a client be involved in an illegal action, such as price fixing, and he would not, absolutely, let them write it in the agreement.

"So I said, 'Okay, if I have your positive assurance. I don't think there is anything illegal about it.' My reasoning for this was completely sound, and the position I took was completely sound, and they didn't disagree with me at all. My reasoning was we are a small company—

"Q. Is this what you expressed to them?

"A. Yes. This was the statements that I made to them, essentially. Our company was a small

company. I used the remark: 'We are giving you our birthright. You can'—that is, Pollock—'can actually give this product away if you wish and thereby enable you to sell more bread wrappings.'

"So, on the other hand, this is our only product in Plas-Ties. We don't make bread wrappings. We don't make anything else. So I must have protection on pricing because if I don't I might just as well put a gun to my head." [Johnson Deposition, p. 37, line 18, to p. 39].

Furthermore, the District Court expressly found, "After the execution of the license agreement, defendant did, until about February 1966, maintain its prices for the products manufactured under the patented process in line with those of Plas-Ties Corporation." [R. 17, lines 25-28, Appeal 22717]. This is most persuasive evidence of the existence of a contemporaneous oral agreement in price fixing. It is the undisputed conduct of the parties to the agreement before there was any controversy. They best know what they intended by their deal and their conduct is evidence of that intention, irrespective of the language of the agreement.

"The acts of the parties under a contract afford one of the most reliable means of arriving at their intention, and, while not conclusive, the construction thus given to a contract by the parties before any controversy has arisen as to its meaning will, when reasonable, be adopted and enforced by the courts. . . .

The reason underlying this rule is that it is a court's duty to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the

> contract, and the practical construction placed by the parties on the instrument is the best evidence of their intention."
>
> 12 Cal. Jur. 2d 341, 342, Contracts, Section 129.

As a matter of fact, in making its ruling on the motion for summary judgment, the District Court conceded that there was evidence which would support a finding that, at the time they entered into the licensing agreement, the parties entered into an oral price fixing agreement. However, the Court felt that it was barred by the California parol evidence rule from receiving any evidence of this agreement.

This is a misconception of what the parol evidence rule in California is. One can always prove the existence of a contemporaneous oral agreement which is not inconsistent with the terms of the written agreement. Moreover, it is almost always necessary for the Court to hear all of the testimony about the negotiations leading up to the agreement before it can determine, *as a question of fact,* whether or not the parol evidence rule applies. This doctrine was recently reaffirmed by the California Supreme Court in the case of *Masterson v. Sine* (February 1968) 68 A.C. 223, where the Court said at pages 227-228:

> ". . . The requirement that the writing must appear incomplete on its face has been repudiated in many cases where parol evidence was admitted 'to prove the existence of a separate oral agreement as to any matter on which the document is silent and which is not inconsistent with its terms' —even though the instrument appeared to state a complete agreement. (E.g., *American Industrial*

Sales Corp. v. Airscope, Inc. (1955) 44 Cal.2d 393, 397 [282 P.2d 504, 49 A.L.R.2d 1344]; *Stockburger v. Dolan* (1939) 14 Cal.2d 313, 317 [94 P.2d 33, 128 A.L.R. 83]; *Crawford v. France* (1933) 219 Cal. 439, 443 [27 P.2d 645]; *Buckner v. A. Leon & Co.* (1928) 204 Cal. 225, 227 [267 P. 693]; *Sivers v. Sivers* (1893) 97 Cal. 518, 521 [32 P. 571]; cf. *Simmons v. California Institute of Technology* (1949) 34 Cal.2d 264, 274 [209 P.2d 581].) *Even under the rule that the writing alone is to be consulted, it was found necessary to examine the alleged collateral agreement before concluding that proof of it was precluded by the writing alone.*" (Emphasis added).

See also:

American Industrial Sales Corp. v. Airscope Inc., (1955) 44 Cal. 2d 393, 397, 282 P. 2d 504, 49 A.L.R. 2d 1344.

In its comments on the applicability of the parol evidence rule, the District Court said:

> "It does not appear to this Court that parties similarly situated would make a price fixing agreement a separate agreement" [R. 21, lines 19-21].

Nonetheless, there was evidence in the record that this is just exactly what they did. Therefore, the Court was wrong in reaching the foregoing conclusion on summary judgment. Moreover, the Court's observations overlook one other very significant fact. The royalty that St. Regis pays to Royal is based upon the prices charged by *Plas-Ties*. This is most unusual. It is much more common for a licensee's royalty to be

determined by its own prices. Therefore, the fact that St. Regis' royalties were to be determined by Plas-Ties' prices strongly suggests that there may have been some collateral agreement between the parties tying St. Regis' prices to those of Plas-Ties.

At any rate, on summary judgment, it was not the Court's function to determine what was "logical." Its only duty was to determine what possible inferences might arise from the evidence. If there was evidence which would support a finding that there was a collateral oral price fixing agreement, the Court should have disregarded any contrary evidence on the motion for summary judgment.

II.

The District Court Erred in Holding as a Matter of Law That No Authorized Representatives of Appellee Executed or Approved the Oral Agreement to Fix Prices.

The question of whether or not Messrs. Lacy, Jacobs and Gary had authority to enter into an oral agreement in behalf of Pollock and/or St. Regis to fix prices was most certainly a question of fact. They were admittedly employees of Pollock sent out to negotiate a licensing arrangement with Royal and they exercised considerable authority in the matter. For example, Mr. Lacy gave Royal a check for $20,000.00 long before the licensing agreement was formally ratified in New York:

> "A. Well, we showed them how to manufacture our product, and believe me, there's considerable confidential know-how. Evidently Pollock agreed with us there was confidential know-how, because

when the agreement was signed in Los Angeles on May 2nd, I believe it was, or May 1st, by then Lacy and myself and Jerry Bower, we would not let Lacy even see our plant until we received the initial payment, which I think was $20,000. It wasn't until Lacy signed the agreement in my office in Pasadena and gave me the $20,000 check that I even let him in the door.

"Now, he must have been of the opinion there's something pretty worthwhile here or he wouldn't have done that." [Johnson Deposition, p. 91, line 22, to p. 92, line 5].

"Q. You have referred to a $20,000 payment for this know-how. Plas-Ties did receive a $20,000 payment?

A. Ben Lacy gave me this, and it was then that I permitted him to visit the plant, which was May 3rd, which is contained in one of the exhibits here. We did not let him visit our plant until we got the money." [Johnson Deposition, p. 95, line 25, to p. 96, line 5].

Mr. Johnson went on to testify as to his understanding as to the formal approval of the agreement by St. Regis headquarters as follows:

"Q. Mr. Johnson, with respect to this license agreement that you entered into with the St. Regis Paper Company do you recall when it was signed by the different individual and where?

"A. I think it was signed May 2nd, 1963. It was signed in our offices at 201 South Lake Street by Mr. Bower, Mr. Lacy and myself, then forwarded routinely to New York for the signature of St. Regis.

"Q. Did the officers of the Pollock Division represent in any fashion what the problems would be, if any, with respect to obtaining St. Regis' approval or signatures, or otherwise?

"A. Yes. Mr. Jacobs originally said in our negotiation meetings, and then at the time of signature Mr. Lacy repeated, that while their signatures comprised the complete agreement, because they were a division of St. Regis they were required to send it in for what they referred to as just the routine and necessary formality of having the president of St. Regis sign the agreement.

"They assured me, and of course it came to pass, that there were no problems raised by St. Regis whatsoever." [Johnson Deposition, p. 100, lines 2-22].

Furthermore, as found by the District Court, the appellee, fixed its prices in accordance with the oral agreement for a continuous period of almost three years; then, when St. Regis reduced its prices, and Royal complained, the former raised them to Plas-Ties!

These facts alone warrant an inference that the appropriate officials of St. Regis approved of and ratified the oral agreement.

Finally, the appellee clothed Messrs. Lacy, Jacobs and Gary with ostensible authority to make the deal, including the oral agreement. Having done so and having enjoyed the fruits of the bargain for so long a time, it should not now be heard to say that their representatives had no authority to do the very thing they were sent out to do. For, it must be remembered that

"An agent may bind his principal by acts within the scope of his ostensible authority. Ostensible authority, or apparent authority as it is often termed,[6] is that authority which a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.[7] This is the embodiment of a well-established common-law principle which has been called the foundation of the law of agency.[8] By its application, an ostensible agency exists where the business done by the supposed agent, so far as it is open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, the party dealt with is justified in believing that an agency exists.[9] If a principal by his conduct has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power.[10]

The doctrine is based upon the equitable principles of estoppel in pais,[11] and stands as a shield against the working of an unjust injury to third persons.[12] Moreover, the general doctrines of estoppel unquestionably apply to agencies, for it has been held that an act of the principal which operates as an estoppel in pais confirms an act of his agent done without authority,[13] and that the agent himself will be estopped by his own declarations of agency to deny that he was acting for his principal.[14]"

3 Cal. Jur. 2d 693-694, Agency, Section 47.

Mr. Johnson testified if the appellee's representatives were unwilling or unable to enter into an agreement on price fixing ". . . Well, if that is the case we simply can't reach an agreement." Therefore, the extent of the authority of Messrs. Lacy, Jacobs and Gary to enter into a contract, whether St. Regis ratified the contract, or whether St. Regis should be estopped from asserting the parol evidence rule are all questions of fact. The District Court improperly decided these questions as matters of law in granting summary judgment.

III.

The District Court Erred in Ruling as a Matter of Law That It Was Illegal for Royal to Require St. Regis to Fix Its Prices for the Tie Strips in Accordance With Plas-Ties' Prices.

In discussing the anti-trust features of the case, the District Court in almost shocked incredulity stated:

> ". . . such oral price fixing agreement could have no legal effect since it violates the Sherman and Clayton Acts' prohibition against agreements in restraint of trade *in that it would require defendant to sell its products made under the patented process at the price fixed by Plas-Ties Corporation, an entirely separate corporation from plaintiff.*" (Emphasis added). [R. 22, lines 10-20, Appeal No. 22717].

There was ample evidence in the record to support an inference that Royal had at least the power and in fact, did, set Plas-Ties prices. Even by the District

Court's reasoning, Plas-Ties was not a conventional licensee of Royal; therefore, it would be necessary to hear all of the evidence on this question before deciding just exactly what the relationship between Royal and Plast-Ties was. Only after such a factual determination would the trial Court be in a position to decide the applicability of the *General Electric* doctrine.

Whether Plas-Ties was "an entirely separate corporation from plaintiff" was a question of fact. However, if it be conceded that, under the doctrine of *United States v. General Electric Co.*, 272 U.S. 476 (1926) case a patentee may require its licensees to sell the patented item at an agreed price, the patentee is free to use any standard that it wants to set its price. There is nothing illegal in having the fixed price be determined by one particular licensee, especially when at the time the second licensing agreement is entered into, the particular licensee is the only manufacturer of the patented item. A patentee might have such confidence in the ability of its first licensee to exploit the market that it is willing to let the licensee set its own prices. (It is not suggested that this is the situation in the case at bar.) If the patentee insists that a second licensee must agree to set its prices at those of the first licensee, the second licensee is free to accept or reject this proposal. Having done so, it cannot violate that agreement with impunity. It must accept the burdens as well as the benefits of the contract. It is no concern of the trial Court that the patentee chose the prices of its first licensee as the standard to which a subsequent licensee must comply.

IV.

The Court Erred in Determining as a Question of Law That the "Know How" Was Owned by Plas-Ties and/or That Royal Could Not Validly Contract to Make This Available to St. Regis.

One of the major predicates of the District Court's opinion is its determination that the "know how" was owned by Plas-Ties, not Royal; that Plas-Ties was a separate entity from Royal; and accordingly, the Court seemed to conclude that nothing Royal did about this "know how" would be effective as regards St. Regis absent some overt act of concurrence by Plas-Ties. The vice of this reasoning is that the Court in effect made determination of fact to reach this result. For example, the Court stated:

> "Actually, the second count makes clear that the 'know how' is the know how of Plas-Ties Corporation, now a wholly owned subsidiary of plaintiff; Plas-Ties is not a party to this action" [R. 15, lines 1-4, Appeal 22717].

The foregoing conclusion is one of fact that just might possibly be wrong. For example, the recitals in the licensing agreement state clearly and unequivocally that Royal owns the "know how". Paragraph 3 states that Royal will furnish certain information, actually "know how", to Pollock. Paragraph 4 binds Pollock to reimburse Royal should the latter's people incur travelling expenses in telling Pollock know how. By Paragraph 11, Pollock binds itself to Royal to hold Royal's "know how" in confidence. Hence, the express language of the licensing agreement constitutes substantial evidence that Royal, not Plas-Ties, owned the "know how" that was the subject matter of the

contract. Therefore, the District Court's references to the fact that Plast-Ties owned the "know how" and the conclusions the Court drew therefore are altogether improper to sustain a summary judgment because the ownership of the "know how" between Royal and Plas-Ties was certainly a question fact.

However, of more fundamental importance is the fact that, irrespective of who owned the "know how", Royal was free to enter into an agreement with St. Regis to furnish the "know how" to it. It would then be Royal's problem to comply with this contractual obligation. There is no complaint that it failed to do so; therefore, one reasonable conclusion, at this stage of the proceedings, is that Royal acquired whatever "know how" it needed to meet its end of the bargain; and therefore, it can complain of St. Regis' continuing to use this "know how" in the event the latter breached its contract.

In short, ownership of the "know how" is essentially immaterial in this lawsuit insofar as St. Regis is concerned.

V.

The Court Erred in Granting the Defendant's Motion for Summary Judgment in Not Finding That There Were No Material Facts in Dispute as Required by Rule 56.

It is basic law that summary judgment is a drastic remedy which must be denied if there is a genuine issue as to a single material issue of fact. *Hycon Mfg. Co. v. H. Koch and Sons* (1955), 219 F. 2d 353; *Cee-Bee Chemical Co. Inc. v. Delco Chemical Inc.,* (1958) 263 F. 2d 150; *Walker v. General Motors Corp.,* (1966)

362 F. 2d 56. In the case at bar there were material issues of fact in dispute. Even the appellee conceded as much in its memorandum of points and authorities in support of its motion for summary judgment:

> "The written license agreement, the relationship of the parties, and the informal license between Royal and Plas-Ties are all controverted facts." [R. 2, line 1; R. 3, line 1, Appeal 22719].

Additionally, the appellee vigorously disputed the validity of Royal's patent. St. Regis conceded that these issues of fact existed, but took the position that there was no legitimate issue of fact on the narrow grounds under which it sought relief [R. 507, 508 Appeal 22456]. The District Court did not make a blanket finding that there was no material issue of fact; instead, in its memorandum decision which the Court said, ". . . constitutes the findings and conclusions of the Court upon the motion for summary judgment" [R. 27, Appeal 22717], the Court made the following statements:

> "There are no material facts which are in dispute upon the question as to whether or not defendant still has a valid license to use the potential process and the 'know how'" [R. 17, lines 2-6, Appeal 22717].
>
> "As stated before there are no material disputed facts herein for the purposes of the motion for summary judgment. The Court need not go into the question as to whether or not the patent is valid or invalid." [R. 26, lines 3-6, Appeal 22717].

It is doubtful that these remarks constitute compliance with the technical rule enunciated by this Court in *Neff Instrument Corp. v. Cohu Electronics, Inc.*,

(CA 9, 1959) 269 F. 2d 668, where the Court said at page 673:

> ". . . Yet on this record the district court granted a motion for summary judgment, apparently feeling the moving party had met and sustained its burden.
>
> 'On a motion for summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt.' Walling v. Fairmont Creamery Co., 8 Cir., 1943, 139 F.2d 318, 322.
>
> We cannot agree with the lower court's implicit conclusion that no material issue of fact remained before him. We would find error, had such a finding been made.
>
> But here no such broad finding was made below. The court found: 'That as to each of the facts hereinafter specifically found, there is no genuine issue.' No finding was made that there were no other material facts in issue which were not specifically found upon. See New & Used Auto Sales, Inc. v. Hansen, 9 Cir., 1957, 245 F.2d 951, 953; Sequoia Union High School Dist. v. United States, 9 Cir., 1957, 245 F.2d 227. See Also, Byrnes v. Mutual Life Ins. Co., 9 Cir., 1954, 217 F.2d 497, 500, and cases quoted therein.

We affirm the technical rule, sufficient in itself to require reversal in this case, that the court below made no finding that 'there is no genuine issue as to any material fact,' as the rule requires before a summary judgment may be granted." (Emphasis added).

The *Neff* case is authority for reversal in the case at bar.

VI.

The District Court Erred in Holding That, as a Matter of Law, the Contemporaneous Oral Agreement to Fix Prices Violated the Clayton and the Sherman Acts.

The District Court ruled that the oral price fixing agreement was unenforceable because it violated the Clayton and Sherman Acts in requiring St. Regis to fix its prices in accordance with those of Plas-Ties, "an entirely separate corporation from plaintiff" in the court's language. The relationship of Royal to Plas-Ties, particularly as regards the prices the latter was to charge for the tie strips, was a question of fact which could be determined only after the trial court heard all of the evidence on the question. For example, at the time the license with St. Regis was entered into, Royal owned 80% of Plas-Ties, it totally directed its corporate affairs, *even to the point where it was necessary for Plas-Ties to have the consent of Royal in order to change its prices.*

One of the basic questions of fact that the Court had to decide before it properly should reach the anti-trust

features of the case was whether or not Plas-Ties had the right to set its own prices. If Royal set Plas-Ties prices, under the *General Electric* doctrine, Royal would validly require St. Regis to follow those prices.

On the other hand, if the court should find that Plas-Ties was free to set its own prices and that St. Regis agreed to follow those prices, it does not automatically follow that this arrangement would be illegal. *General Electric* stands for the proposition that a patentee may require a licensee to maintain its prices in conformity with those of the patentee. This doctrine was recently reaffirmed by the Supreme Court in the recent case of *United States v. Huck,* 227 F. Supp. 791, affirmed at 383 U.S. 197 (1965). (The *Huck* decision specifically considered *Line Material Co., U.S. Gypsum* and *New Wrinkle,* relied on by the District Court). In the case at bar, the patentee, Royal, does not engage in the manufacturing of the patented product. Instead it has assigned that task to Plas-Ties, its subsidiary. The trial court characterized this arrangement as "an informal license", whatever that is. (As mentioned above, the nature of the relationship is a question of fact.) However, this fact alone should not deprive the patentee of his right to protect his government granted monopoly by requiring a subsequent licensee to maintain prices in accordance with those set by the patentee for its subsidiary.

On the other hand, the District Court found as a matter of fact that Plas-Ties was a wholly separate cor-

poration which enjoyed an informal license from Royal and which was perfectly free to set its own prices. The court flatly stated that Royal could not require St. Regis to tie its prices to Plas-Ties. It is not clear from the Court's memorandum decision just what its reasoning was. It may have felt that the *General Electric* doctrine is limited to a single licensee. (*Newbury Moire v. Superior Moire Co.,* (CCA 3) 237 F. 2d 283.) This circuit has not passed on this question. The Fourth Circuit uphold a multiple license situation in *Glen Raven Knitting Mills v. Sanson Hoisery Mills,* 189 F. 2d 845, and in *Westinghouse Electric Corp. v. Bulldog Electric Products* (CCA 4 1950) 179 F. 2d 139. The Sixth Circuit reached the same result in *Prestole Corporation v. Tinnerman Products, Inc.* (CCA 6, 1959), 271 F. 2d 146.

The latter cases point out that the mere fact that a patentee may have entered into multiple licenses in which he has endeavored to maintain prices is not illegal. Before the patentee will be denied the protection of the *General Electric doctrine,* it is necessary to find a horizontal price fixing area arrangement or some conspiracy or restraint of trade.

There are no facts in the record to warrant such a conclusion especially on summary judgment in the light of the vast economic power of St. Regis compared to Plas-Ties.

The District Court's decision is based upon its factual determination concerning the status of Plas-Ties and its relationship to Royal. It cannot be gainsaid that the court failed to draw the inferences most favorable to the appellant on these issues. Therefore, summary judgment was not proper.

VII.

The District Court Abused Its Discretion in Denying Appellant's Request for a Preliminary Injunction.

The District Court denied the appellant's motion for a preliminary injunction to compel St. Regis to comply with the oral pricing agreement. No doubt, the court reached its decision because of its conclusions concerning the separate identity of Plas-Ties and the unenforceability of the oral pricing agreement because of the parol evidence rule and the anti-trust laws. The appellee vigorously disputed the validity of Royal's patent but the district court did not reach this issue.

It is the appellant's position that, in view of the presumptive validity of its patent and the fact that St. Regis maintained its prices almost without interruption from May 1963 until May 1967, a court of equity should have restrained St. Regis from violating the pricing agreement *pendente lite*. Otherwise, Royal and/or Plas-Ties will suffer irreparable damage. This is particularly true where St. Regis wields such disproportionate economic power to Plas-Ties. The last peaceful non-contested status of the parties was before St. Regis' unilateral reduction of prices in May 1967. That status should be maintained until there has been a full hearing on the merits. The relationship of Royal to Plas-Ties should not stand in the way of this remedy.

> "A court of equity, in order to do justice, does not hesitate to disregard a corporate entity and to recognize that all of the assets of a solvent wholly

owned subsidiary are equitably owned by the parent corporation."

Continental Distilling Corp. v. Old Charter Distillery Co., et al., (CCA-DC 1950) 188 F. 2d 614, at page 620.

Conclusion.

The appellant established *prima facie* that St. Regis orally agreed to set its price in accordance with those of Plas-Ties; that the latter's violation of this agreement constituted a material breach of contract entitling Royal to terminate St. Regis' license and to compel the latter from infringing its patent and appropriating its know how. A proper decision could be had only after a full hearing on the merits.

It was error to decide this case on summary judgment and to deny appellant protective relief *pendente lite.*

Respectfully submitted,

CHRISTIE, PARKER AND HALE
and
NEWELL & CHESTER,
By ROBERT M. NEWELL,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT M. NEWELL

Nos. 22456 and 22717

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDUSTRIES, a corporation,

Appellant,

vs.

ST. REGIS PAPER COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

O'MELVENY & MYERS,
BENNETT W. PRIEST,
433 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Appellee,
St. Regis Paper Company.

Of Counsel:
WARD, MCELHANNON,
BROOKS & FITZPATRICK,
STUART A. WHITE,
NICHOLAS L. COCH.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

Statement of the Case.

Appellee, St. Regis Paper Company (hereinafter "St. Regis") does not believe that the statement of the case by appellant, Royal Industries (hereinafter "Royal") adequately or accurately sets forth the basic facts involved in these appeals. Therefore, St. Regis here sets forth a brief summary of the facts and the history of the litigation.

Royal is the owner of a United States Patent, No. 2,767,113, by assignment in 1963 from the inventor, Gerald C. Bower [Ex. D-24 of DaRin Dep.; R. 3].* Approximately at the same time as the assignment, Royal also acquired 80% ownership of Plas-Ties Corporation (hereinafter "Plas-Ties"), the remaining 20% ownership being held by Bower [Johnson Dep. pp. 4-7]. Plas-Ties was then manufacturing products under the patent,

*All references to the Record are to the Transcript of Record in Appeal No. 22456, unless otherwise noted.

which are referred to as plastic tie strips. Royal has never manufactured or sold any of such plastic tie strips, but has allowed Plas-Ties to continue to manufacture and sell them. No written patent license between Royal and Plas-Ties exists, but there appears to be an informal license [Johnson Dep. pp. 7-8, 32, 97].

Although Royal acquired the remaining 20% ownership of Plas-Ties from Bower in 1965, Plas-Ties has never been merged into Royal and continues to exist as a separate corporate entity both in law and in operation. Plas-Ties has had its own Board of Directors who meet three or four times a year, and its President runs the corporation [Johnson Dep. p. 29]. Plas-Ties has always had its own manufacturing and selling operations and systems of accounting. There have been no employees in common between Plas-Ties and Royal, except Johnson and Sherburn, who are officers and directors of both [Johnson Dep. pp. 5, 9, 11-12, 112-113].

Prior to Royal's acquisition of an interest in Plas-Ties, negotiations had commenced between the Pollock Paper Division of St. Regis and Bower for rights to sell and possibly to manufacture plastic tie strips under the patent. After Royal acquired the Bower patent, it joined in these negotiations. Royal indicated a willingness to license St. Regis to manufacture, use and sell the plastic tie strips under the patent it had acquired, and Plas-Ties indicated its willingness to license St. Regis to use its know-how with respect to the manufacture of the strips [Johnson Dep. pp. 15-19 and Exs. D-1 and D-2 thereto].

Face to face negotiations were conducted in Dallas, Texas and in Pasadena, California, and there was correspondence concerning the terms and conditions of

the proposed agreement [Johnson Dep. pp. 15-19, 23-28 and Exs. D-3 to D-7 thereto]. In these negotiations Johnson and Bower represented Royal and Plas-Ties, together with their patent counsel (Hale and Da-Rin), and Jacobs and Lacy represented the Pollock Paper Division of St. Regis, with Gary, their patent lawyer. Neither Jacobs nor Lacy was an officer of St. Regis and neither had authority to bind St. Regis to the agreement being negotiated [Johnson Dep. pp. 15, 35-43, 45, 100; R. 157-158].

The final form of written license agreement was signed by Johnson for Royal and by Bower for Plas-Ties on May 2, 1963, at a meeting in Pasadena with representatives of the Pollock Paper Division of St. Regis. One of those representatives (Lacy) signed for Pollock at that time, and the license was then forwarded to the corporate office of St. Regis in New York for review, approval and execution by St. Regis [Johnson Dep. pp. 36, 41, 44-46 and Exs. D-10 and D-12 thereto]. It was clearly understood and acknowledged by Royal and Plas-Ties that the license had to be approved and signed by a corporate officer of St. Regis before it could become binding upon St. Regis [Johnson Dep. p. 36 and Exs. D-10, D-12 and D-15 thereto]. The license document was, in fact, reviewed by St. Regis and approved and executed by Adams, the president of St. Regis. It was then delivered to Royal and Plas-Ties [R. 156-158; Ex. D-15 to Johnson Dep.].

The license document as executed by Royal, Plas-Ties, Pollock Paper Division and St. Regis is ten pages in length and contains all of the normal and usual provisions of a patent and know-how license. It is complete on its face. Among other matters, it contains ex-

press provisions giving Royal and Plas-Ties, as licensors, the right to terminate the license under certain designated conditions [Sections 2, 10 and 12; R. 16, 20-23]. In Section 5 of the patent license, there is express reference to the selling prices of Plas-Ties; the royalty rate for St. Regis is to be reduced in direct proportion to any future price reductions by Plas-Ties [R. 18]. The then-current price schedule of Plas-Ties was attached as an exhibit to the license [R. 25].

In the complaint here involved, as well as affidavits and depositions by Royal's personnel, there is a claim that Royal imposed an oral condition on the patent license, which is nowhere referred to in the license itself. Royal claims that the oral condition gave it the right to control the selling price of patented tie strips and to require St. Regis to sell such strips at prices not less than those charged by Plas-Ties [R. 6]. Royal claims that the Pollock negotiators agreed to this oral condition but requested that no reference be made to it in the written license [Johnson Dep. pp. 37-40]. The license document contains no price-fixing provisions whatever, nor does it give a right of termination to Royal for any price changes by St. Regis. The prices originally set by the Pollock division of St. Regis for its plastic tie strips were the same as those being charged by Plas-Ties for strips manufactured and sold by it. In February 1966, Pollock reduced its prices, and Plas-Ties followed within the next month, without complaint [R. 117, 107]. In June, 1966 Pollock made a second reduction, of which Plas-Ties and Royal complained. After a conference in Los Angeles, St. Regis raised its prices but not to the price level maintained by Plas-Ties [Ex. D-21 to Johnson Dep. R. 112-113, 106].

In May 1967, St. Regis announced a third price reduction for its plastic tie strips. Johnson, the president of Royal, sent a letter to St. Regis dated June 8, 1967, which Royal now contends constituted a termination of the license to St. Regis [R. 5-6, 130-132]. Plas-Ties was not a party to this attempted termination. The sole reason given by Royal for the alleged termination of the patent license was St. Regis' reduction of prices below those charged by Plas-Ties and the refusal of St. Regis to raise its prices upon Royal's demand [R. 57]. St. Regis refused to consider or accept Royal's letter as an effective termination of the license.

In July 1967, Royal alone brought the present action by a complaint containing two causes of action. The first count is for alleged infringement of the patent, and the second is for alleged wrongful unfair competition by use of know-how which Plas-Ties furnished to St. Regis under the license [R. 2-25]. Plas-Ties is not a party to the action and no leave was ever sought in the trial court to join Plas-Ties as a plaintiff.

Royal moved for a preliminary injunction and, after submission of affidavits and briefs, the motion was denied, a written opinion being filed [R. 530-533].

In its answer, St. Regis raised the defense of license and denied that Royal had any legal right to terminate the license upon the ground claimed. During the course of proceedings on Royal's motion for preliminary injunction, St. Regis filed a motion for summary judgment. The basis of the motion was that there were no genuine issues of material fact (a) as to application of the parol evidence rule to the alleged oral price-fixing

condition, and (b) as to the illegality of the alleged oral condition under the antitrust laws. The motion for summary judgment was granted upon the grounds urged, the written opinion constituting the conclusions of the court upon the undisputed, material facts [R. 14-27 in Appeal No. 22717].

Royal has appealed from the order denying its motion for preliminary injunction (Appeal No. 22456) and from the ruling granting St. Regis a summary judgment (Appeal No. 22717). The appeals have been consolidated for the purpose of expediting this court's review.

Issues.

In determining both the motion for summary judgment and the motion for preliminary injunction the primary issues were identical. These remain as the issues before this court on the consolidated appeals, to wit:

1. Does the parol evidence rule bar consideration of an alleged oral condition to the written patent license, the condition being that St. Regis must maintain its selling prices of patented tie strips at prices charged by Plas-Ties?

2. Could Royal unilaterally terminate the license without joinder by Plas-Ties, the co-licensor?

3. Was the alleged oral price-fixing condition illegal and unenforceable under the antitrust laws?

Royal has raised a subsidiary issue on the appeal from the summary judgment; that is, did the trial court correctly determine that there was no genuine dispute as to any material fact concerning the grounds of the summary judgment. Also, there is a subsidiary issue on the

appeal from the order denying a preliminary injunction, as to whether the trial court abused its discretion in reaching that decision.

I.
Introduction.

In its answer and motion for a summary judgment St. Regis contended that the license from both Royal and Plas-Ties was still in full force and effect, thereby negating any patent infringement or unfair competition. Summary judgment was granted upon the ground that, as a matter of law, St. Regis did hold a patent and know-how license from Royal and Plas-Ties which had not been terminated. Although facts on other aspects of the case were in dispute, the only facts material to the defense of license were uncontroverted. Hence, the trial court correctly determined that F.R.C.P. 56 entitled St. Regis to a summary judgment in its favor.

There are several independent grounds for a determination that the St. Regis license was not effectively terminated by Royal. Any one of these is sufficient for affirmance of the judgment.

II.
The License Could Not Be Terminated for Violation of an Oral Price-Fixing Condition Because Use of Such Condition Would Be a Violation of the Parol Evidence Rule.

The foundation of Royal's claim is that it was a violation of the license for St. Regis to sell patented products for lower prices than those charged by Plas-Ties. However, the detailed, formal written patent license, placed before the trial court as part of Royal's complaint

[R. 15-25], contains no price-fixing provision. Nor does the written license refer to any oral condition or understanding by which Royal claims St. Regis agreed to maintain prices as a condition of obtaining the license. The written license appears on its face to be a complete statement of the parties' agreements and understandings concerning the manufacture and sale of the patented items. It sets forth with exactitude the conditions under which the licensors, Royal and Plas-Ties, could terminate the license [R. 16, 20 and 22]. It was carefully drawn and was the result of extensive negotiations between the parties, in which they were represented by counsel. There is no ambiguity or uncertainty, either patent or latent, in its terms.

Thus, a classic case is presented for the application of the parol evidence rule to bar consideration and use of an alleged oral condition materially adding to and altering a written agreement.

A. California Law on the Parol Evidence Rule Is Controlling.

The parol evidence rule is not a mere rule of evidence concerned with the method of proving an agreement. Rather, it is a rule of substantive law.

> *Estate of Gaines,* 15 Cal. 2d 255, 264; 100 P. 2d 1055, 1060 (1940).

In fact, it is more properly referred to as "the integration doctrine" because it deals with the legal effect of integrated agreements, rather than the exclusion of evidence of oral negotiations.

Accordingly, as a rule of substantive law, the parol evidence rule of the state in which the document is executed is controlling in an action in federal courts.

Production Livestock Loan Co. v. Idaho Livestock Auction, Inc., 230 F. 2d 892, 894 (9th Cir. 1956);

Black v. Richfield Oil Corp., 146 F. 2d 801, 804 (9th Cir. 1944), *Cert. denied* 325 U.S. 867 (1945).

The St. Regis patent license was negotiated and executed by Royal, Plas-Ties, and Pollock Paper in California. Thus, California law controls on the parol evidence rule.

California's rule is found both in its statutes and precedents. The basic statute is Civil Code § 1625:

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execuston of the instrument."

Code of Civil Procedure § 1856 is to the same effect, but provides exceptions for evidence to explain an extrinsic ambiguity, to establish illegality or fraud, or to show a mistake in the writing put in issue by the pleadings.

According to one Court of Appeals, the parol evidence rule is "strictly adhered to in California". *Smith v. Bear,* 230 F. 2d 79, 85 (2d Cir. 1956). The characterization by this Court is that the rule of evidentiary exclusion is "firmly applied." *Western Machinery Company v. Northwestern Improvement Co.,* 254 F. 2d 453, 458 (9th Cir. 1958). For example, in *Black v. Richfield Oil Corp., supra,* this Court affirmed a judgment denying relief to a patentee on his claim that one patent had inadvertently been omitted from the list of

patents being licensed, on the ground that the California parol evidence rule prevented consideration of evidence "clearly" showing the intent of both parties to list all patents held by the patentee.

B. The Written License Agreement Was Intended to Be and Is an Integration, a Final and Complete Expression of the Agreement of the Parties.

Under California law, as elsewhere, the initial question to be answered in determining the applicability of the parol evidence rule is the following:

> "Is the writing an integration of the agreements of the parties?"

An agreement is integrated when the parties adopt the writing as the final and complete expression of their agreement. The integration is the writing so adopted. Restatement of Contracts, § 228.

Under California Code of Civil Procedure § 1856 there is a presumption that a written agreement was intended to contain all of the terms of the agreement of the parties. Accordingly, the California courts hold that finality of expression is determined from *the face of the document itself.* If on its face a document purports to be the complete expression of an agreement, it is *conclusively presumed* to contain all of the agreed terms and extrinsic evidence of other terms or conditions is excluded. *United Iron Works v. Outer Harbor, Etc. Co.,* 168 Cal. 81, 84, 141 Pac. 917, 919-920 (1914); *Thoroman v. David,* 199 Cal. 386, 390, 249 Pac. 513, 514 (1926); *Jones v. Foster,* 116 Cal. App. 102, 105, 2 P. 2d 582, 583 (1931).

The "face of the document test" has been applied by this Court as well as other federal courts considering

similar problems. *Black v. Richfield Oil Corp., supra* at 804; *Anderson v. Owens,* 205 F. 2d 940, 943 (9th Cir. 1953); *Belvidere Distilling Co. v. Reconstruction Finance Corp.,* 211 F. 2d 893, 895 (7th Cir. 1954). A recent expression of the rule is also found in *Commodity Credit Corp. v. Rosenberg Bros. & Co.,* 243 F. 2d 504, 508 (9th Cir. 1957), *cert. denied* 355 U.S. 837 (1957).

The St. Regis license on its face is a complete expression of an agreement upon the terms and conditions under which St. Regis could manufacture, use and sell plastic tie strips utilizing Royal's patent and Plas-Ties' know-how. There is nothing which appears incomplete, nor is there missing any element of a normal patent license. Indeed, Royal has never claimed that the document is incomplete, or that there is any mistake or extrinsic ambiguity. Therefore the "face of the document test" precludes addition to the license of the oral condition alleged by Royal.

In addition, in *Production Livestock, supra,* it was held that if the particular element of the extrinsic negotiation is mentioned, covered or dealt with in the writing "then presumably the writing was meant to represent all of the transaction on that element; . . ." 230 F. 2d at 844. In the present case, the subject of selling prices of the patented product is carefully dealt with in the patent license [R. 18]. The conditions allowing for termination by Royal and Plas-Ties are thoroughly detailed in three paragraphs of the license [R. 16, 20 and 22]. Hence, it must be presumed that the written license was meant to represent all of the transactions by the parties on these subjects.

Even if the written license was considered to be completely silent on the matter of selling prices for the patented product, that silence would not open the door to parol evidence of an oral price-fixing condition. This is the clear holding of the Supreme Court in *Seitz v. Brewers Refrigerating Machine Co.,* 141 U.S. 510, 517 (1891), and of this Court in *Anderson v. Owens, supra* at 942. See also, *Belvidere Distilling Co. v. Reconstruction Finance Corp., supra; Maryland Casualty Co. v. U.S.,* 169 F. 2d 102, 110 (8th Cir. 1948).

Moreover, not only does the written St. Regis license appear on its face to be complete in every respect, but there is a special and compelling reason why the negotiating parties must have intended it to be a complete expression of their agreement. As was known and acknowledged by both licensors during the negotiations, the agreement had to be reduced to a writing approved and executed by a corporate officer of St. Regis before it could become binding on that company as a licensee [Johnson Dep. p. 36 and Exs. D-10, D-12 and D-15 thereto].

C. Application of the Parol Evidence Rule to an Agreement Is a Question of Law, Not of Fact.

The integration doctrine which brings the parol evidence rule into operation is a question of law for the Court and not a question of fact. *Harrison v. McCormick,* 89 Cal. 327, 330, 26 Pac. 830, 831 (1891); *Stephan v. Lagerqvest,* 52 Cal. App. 519, 523, 199 Pac. 52, 54 (1921); *Jones v. Foster, supra; South Florida Lumber Mills v. Breuchaud,* 51 F. 2d 490, 493 (5th Cir. 1931); see also, *General Casualty Company v. Azteca Films, Inc.,* 278 F. 2d 161, 168 (9th Cir. 1960).

Royal's bald assertion that application of the parol evidence rule is a question of fact is unsupported and erroneous (App. Br. p. 12).

Being a question of law, application of the parol evidence rule is a proper ground for summary judgment.

D. The Alleged Oral Price-Fixing Condition Does Not Come Within Any Exception to the Parol Evidence Rule.

Royal contends that the parol evidence rule is not applicable because the oral condition comes within an exception for "consistent collateral agreements". Royal argues that the price-fixing condition was a separate collateral understanding, upon a matter as to which the written agreement is silent, and that it is consistent with the written agreement (App. Op. Br. pp. 12-14). However, neither the facts nor the law support Royal's argument for the exception, as the trial court concluded.

California law requires certain express conditions which must be met in order to bring this exception into operation:

(a) The collateral agreement must have a separate consideration;

(b) It must be on a subject distinct from that to which the writing relates and on which the writing is silent;

(c) It must be such as might naturally be made as a separate agreement by parties so situated.

Ayres v. Southern Pacific Rwy., 173 Cal. 74, 159 Pac. 144 (1916); *Pacific States Securities Co. v. Steiner,* 192 Cal. 376, 220 Pac. 304 (1923); *Gardiner v. Burket,* 3 Cal. App. 2d 666, 40 P. 2d 279 (1935); *Pellissier v. Hunter,* 209 Cal. App. 2d 306, 25 Cal. Rptr. 779

(1962); Restatement of Contracts, § 240; see also, *William Pocahontas Coal Co. v. Berwind Land Co.*, 76 F. 2d 319 (4th Cir. 1935), *cert. denied,* 296 U.S. 610 (1936). For the following reasons, the facts of the present case do not fit within these conditions.

First, there was no separate consideration for the alleged oral condition. The only consideration flowing to St. Regis was that for the written license—the right to manufacture, use and sell devices utilizing the patent and the know-how. No other consideration can be conjured up for a promise by St. Regis to keep its prices at or above the level charged by Plas-Ties.

Second, the oral condition concerns a subject covered by the writing. Section 5 of the written license deals with Plas-Ties' prices as affecting the royalty rate to be paid by St. Regis. Sections 2, 10 and 12 deal with the conditions allowing termination of the license by Royal and Plas-Ties. In a real sense, the alleged oral condition is inconsistent with the latter provisions. Termination of a license involves the forfeiture and loss of the licensee's investment in the program. Therefore, provisions giving licensors the right to terminate are obviously given serious and thorough consideration in drafting a written license. Having carefully and explicitly provided in the document for the conditions allowing termination, it is inconsistent and harmful to add a further condition by oral evidence. *Pacific States Securities Co. v. Steiner, supra; Parker v. Meneley*, 106 Cal. App. 2d 391, 402, 235 P. 2d 101, 106-7 (1951).

Third, the alleged oral condition is not one such as might naturally be made as a separate agreement by parties situated as were Royal, Plas-Ties and St.

Regis here. Royal claims that price-fixing was essential to its survival, when dealing with a licensee as large as St. Regis. It also claims that such a price-fixing condition is absolutely legal, under *United States v. General Electric Co.,* 272 U.S. 476 (1926). In these circumstances, it would be unnatural for Royal to make this matter a subject of separate, oral understanding, subject to the vicissitudes of memory and interpretation. Further, as noted, Royal and Plas-Ties knew the agreement had to be examined and approved by an officer of St. Regis. Why, then, would they leave out the price-fixing condition and run the risk of a later misunderstanding with St. Regis due to lack of communication? Further, it would be unnatural for Royal to leave this as a matter for separate, oral understanding in view of the unwavering view taken by the Pollock Paper negotiators that a price-fixing condition was illegal [Johnson Dep. p. 37]. Faced with that attitude, Royal's obvious protection would be to insist that the alleged condition be explicitly in the writing, so that St. Regis would have to "fish or cut bait"—accept the license with price-fixing or not obtain the license.*

Nothing in *Masterson v. Sine,* 68 A.C. 223 (1968) and *American Industrial Sales Corp. v. Airscope, Inc.* 44 Cal. 2d 393, 282 P. 2d 504 (1955), cited by Royal

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*Royal argues that the trial court made a finding of disputed fact in observing that "it does not appear to this Court that parties similarly situated would make a price-fixing agreement a separate agreement" (App. Br. p. 8). That observation is simply a legal conclusion necessary in applying the three tests set forth above to Royal's argument for an exception to the parol evidence rule. It is a conclusion that must be drawn from the uncontroverted words of the document and *Royal's own testimony as to the circumstances of its execution.*

(App. Br. pp. pp. 12-13), calls for enforcement of an oral price-fixing condition. In *Masterson* it was determined that an oral contemporaneous agreement was on a subject on which the written agreement was silent and that it was natural for the parties to make the agreement separate from the writing (68 A.C. at 229). Thus, the oral agreement was sustained as meeting the tests for this exception to the parol evidence rule. Likewise, in *American Industrial Sales Corp.* the Court expressly affirmed those tests for invoking the exception, and held that the oral agreement there involved was on a subject as to which the document was silent, was consistent with the writing, and was a natural subject of oral, separate, contemporaneous understanding. Contrary to Royal, there is no holding or discussion in *Masterson* that application of the parol evidence rule is a question *of fact.* (And see *Parsons v. Bristol Development Co.,* 62 Cal. 2d 861, 865, 402 P. 2d 839 (1965), again holding that it involves a question of law for the court.)

Thus, Royal cannot rely on the "consistent collateral agreement" exception to the parol evidence rule.

Finally, Royal argues that the fact the St. Regis license document provides for the royalties to be determined by Plas-Ties prices "strongly suggests that there may have been some collateral agreement between the parties tying St. Regis' prices to those of Plas-Ties." (App. Br. pp. 13-14). It does not so suggest. The license provision is that the St. Regis royalty *rate* is to be reduced if Plas-Ties prices are reduced. This only suggests that Royal bargained for and obtained *partial* protection against its royalty income being re-

duced by reason of arbitrary price reductions by St. Regis. It hardly suggests *complete* protection through price-fixing of St. Regis prices.

E. Patent Law Does Not Allow Termination of a Patent and Know-How License Except Upon Grounds Set Forth in the License.

As noted, the St. Regis license sets forth certain express situations under which each party may terminate the license in advance of its normal expiration. None of its express conditions allowing termination have occurred, and Royal does not so contend. Under ordinary principles of patent law, Royal did not have the right to attempt to terminate the license.

Kelly v. Porter, 17 Fed. 519 (C.C.D. Cal. 1883), is closely in point. The owner of a patent brought an infringement action and the defendant user claimed that he held a license. The patentee alleged that he had revoked the license in writing prior to instituting the action. The court noted that the patent license specified certain conditions for revocation, which had not occurred:

> "Thus it is provided in express terms under what circumstances the contract shall be abrogated; and, having named those terms, it must be presumed that they cover all the contingencies contemplated by the parties upon which the contract should cease." (17 Fed. at 522).

Accordingly, the court held that the patent holder did not have a right to revoke the license, "there being no stipulation to that effect within the contract." The court sustained a demurrer to the complaint and dismissed the action.

In a more recent action, it was held that a licensee could not claim that the license had been revoked (or that it had been ousted) when it had not complied with the license provisions allowing termination under specific conditions. *Sbicca-Del Mac, Inc. v. Milius Shoe Co.,* 145 F. 2d 389 (8th Cir. 1944).

> "The parties were at liberty to enter into a license agreement containing any conditions for terminating the contract upon which they could agree, and such conditions were binding. The clause in the contract is the measure of the defendant's rights. United States v. Harvey Steel Co., 196 U.S. 310, 316, 25 S.Ct. 240, 49 L.Ed. 492. And when the contingency for which they provided in their contract occurred they were bound by the terms upon which they had agreed, and the contract could be terminated in no other way without the mutual consent of both parties." (145 F. 2d at 401).

Likewise in *United Mfg. Service Co. v. Holwin Corp.,* 187 F. 2d 902 (7th Cir. 1951), the court found that a patent owner had not terminated a license by reason of certain letters written to customers of its licensee. The court said, in response to the licensee's contention that such letters constituted a repudiation of the license:

> "However, it is clear that the unilateral action of one party to a patent license agreement cannot revoke the agreement. . . . Our courts generally take a strict view on attempted revocations or forfeitures of license agreements. The courts dislike forfeitures." (187 F. 2d at 905). (Citations omitted).

Finally, even if the court were to find that the parol evidence rule does not bar consideration of the alleged oral condition, it cannot be said that breach of that alleged condition is grounds for termination of the St. Regis license. Nowhere in Royal's brief or supplementary materials is it contended that the parties agreed or understood that breach of the alleged condition would constitute ground for termination. At best, Royal's remedy would be one at law for damages. *Walker on Patents,* Dellers 2d Ed., agrees with this position stating:

> "Forfeiture of a license does not follow from the single fact that the licensee has broken covenants which were made by him when accepting the license, unless the parties expressly agreed that such a forfeiture should follow a breach." (Sec. 410)

III.

The Written License Could Not Be Terminated by Royal Because the Co-Licensor, Plas-Ties, Did Not Join in the Attempt to Terminate.

The license in issue runs from both Royal and Plas-Ties to St. Regis. Royal owned only the patent and licensed only rights under that patent. Plas-Ties owned only the know-how and licensed only that know-how. The 10% royalty rate was an aggregate of eqaul 5% rates for the use of the patent and of the know-how [Johnson Dep. pp. 31-32 and Ex. D-4 thereto]. Yet, the attempt to terminate the license came from Royal alone. Plas-Ties did not purport to terminate the license, either in June, 1967 or at any time in the proceedings in the trial court. Such an attempted termination

is ineffective if it fails to come from all of the licensors.

> ". . . where several persons are arrayed on the same side of a transaction—as joint contractors, joint purchasers, or joint vendors * * * one of them alone cannot repudiate or terminate the contract, or obtain its rescission, without the consent or against the objections of the others. Thus, one joint and several obligor cannot rescind an agreement whereby both are discharged from liability on the obligation, and thereby bind his co-obligor, if the latter does not consent to the rescission." 3 Black, Rescission and Cancellation, 2d ed., 1929, p. 1362.

The above passage was cited with approval in *Denker v. Twentieth Century Fox Film Corp.,* 179 N.E. 2d 336, 337-8 (N.Y. 1961), where the New York Court of Appeals held that one of three copyright owners who had licensed defendant to produce a motion picture could not terminate the copyright license unless the other licensors joined in such termination. See also 3 *Walker on Patents,* Dellers Ed., §430 (1937).

Not only did Plas-Ties not attempt to terminate the license, but it also did not join in this action. Royal has attempted to explain this situation by claiming that Plas-Ties should not be treated as a separate corporation, but as only another aspect of Royal, and that "possibly" Royal owns the know-how which was licensed (App. Br. pp. 18-21). These arguments border on the ridiculous.

There are compelling reasons requiring the joinder of the co-licensor, Plas-Ties, in any termination. First, Plas-Ties was and is a wholly separate corporation, with its own officers, directors, plant, and operations. There are only two officers or directors in common between Royal and Plas-Ties [Johnson Dep. pp. 11-12]. Second, at the time of the license Royal owned only 80% of Plas-Ties' stock and did not acquire the other 20% until several years later. Third, Plas-Ties had developed the know-how licensed to St. Regis long prior to Royal's acquisition of any stock of Plas-Ties. Finally, Plas-Ties was treated as a separate corporate party to the license and in all subsequent dealings thereunder [Johnson Dep. pp. 4-7, 9, 11-12, 29, 112-113].

Having chosen to use a corporate form for the business of Plas-Ties, Royal cannot now ignore that corporate form in order to avoid a disadvantage created thereby. *O'Neill v. Commissioner,* 271 F. 2d 44 (9th Cir. 1959); *Commissioner v. Schaefer,* 240 F. 2d 381 (2d Cir. 1957); *Rogan v. Delaney,* 110 F. 2d 336 (9th Cir. 1940); *Goldberg v. Tri-States Theatre Corp.,* 126 F. 2d 26 (8th Cir. 1942). This principle of estoppel of a corporate owner to ignore the corporate form is likewise found in California law. *Wynn v. Treasure Co.,* 146 Cal. App. 2d 69, 303 P. 2d 1067 (1956); *Charles Ehrlich & Co. v. J. Ellis Slater Co.,* 183 Cal. 709, 192 Pac. 526 (1920).

There are, of course, many cases in Federal and California courts involving attempts by third parties to

pierce the corporate veil of subsidiary corporations, or corporations held and dominated by one or two stockholders. Such piercing is allowed in equity to avoid protection of fraud or to avoid defeat of public or private rights. See *e.g. Maule Industries v. Gerstel,* 232 F. 2d 294 (5th Cir. 1956); *Luis v. Orcutt Town Water Co.,* 204 Cal. App. 2d 433, 22 Cal. Rptr. 389 (1962). Here, Royal is not an innocent third party asking the court to disregard Plas-Ties' corporate veil to avoid fraud or protect any public rights. Hence, there is no justification whatever to treat Plas-Ties as just another name for Royal.

In its brief, Royal carries its argument to the extreme of contending that Royal "possibly" owned the licensed know-how because the license uses the collective term "Royal" in its operative sections. This contention ignores the preamble of the license which states that both Royal and Plas-Ties are corporations and are the licensors [R. 15] and uses the collective term "Royal" for simplicity. It also ignores the testimony of Royal's own president that Plas-Ties developed the know-how before Royal acquired any stock and that Plas-Ties still owns the know-how, for which it receives royalty [Johnson Dep. p. 80]. Thus, Plas-Ties was and is a necessary party to the license. Its failure to join in the attempted termination of the license renders that attempt invalid.

IV.

The Trial Court Correctly Ruled That the Alleged Oral Price Fixing Agreement of May 1963 Was Illegal as Violative of the Sherman and Clayton Acts.

Assuming the existence of an oral price-fixing agreement in May, 1963, as stated in Royal's complaint and affidavits, such an agreement could not be enforced since it violates both the Sherman and Clayton Antitrust Acts (15 U.S.C. § 1 *et seq.*). Price-fixing agreements are among the class of restraints which are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railroad v. United States,* 356 U.S. 1 (1958). Recognizing that a price-fixing restriction in the license agreement would ordinarily constitute a *per se* violation of the antitrust laws, Royal argues* that such a restriction is justified on the authority of *United States v. General Electric Co.,* 272 U.S. 476 (1926) and *United States v. Huck,* 227 F. Supp. 791, *aff. per curiam by evenly divided court,* 382 U.S. 197 (1965).

The essence of Royal's argument is that the *General Electric* decision authorizes a patentee (Royal) to fix the prices at which its licensees may sell the patented item. However, the alleged oral agreement was that Plas-Ties, not Royal, was to set the prices at which St. Regis could sell. In response, Royal contends that it had the power to, and in fact did, set the selling prices

*For some inexplicable reason, Royal states this argument in two separate sections of its brief, sections III and VI (pp. 18-19 and 24-26).

for St. Regis. In the alternative, Royal contends that even if Plas-Ties, rather than Royal, set the selling prices, such a power in Plas-Ties is legal under *General Electric.* Under either argument, Royal's reliance upon *General Electric* is misplaced.

The *General Electric* decision does not authorize a *non-manufacturing patentee,* such as Royal, to fix prices in a patent licensing agreement. Moreover, the *General Electric* decision authorizes *only* a manufacturing patentee to fix prices and does not allow delegation of that power to another. These points are stated quite clearly in the opinion:

> "One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the *patentee* licenses another to make and vend *and retains the right to continue to make and vend on his own account,* the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain *by making them and selling them myself.*' " 272 U.S. at 490 (Emphasis added).

As the passage indicates, the decision was predicated upon the assumption that the patentee would manufacture and sell the patented item. This same assumption can be found in subsequent Supreme Court deci-

sions limiting the scope of the *General Electric* exception to the *per se* rule of price-fixing. For example, in *United States v. Line Material Co.,* 333 U.S. 287 (1948) it was stated:

> "We are thus called upon to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act. That adjustment has already reached the point, as the precedents now stand, that a *patentee* may validly license *a competitor* to make and vend with a price limitation under the *General Electric* case and that the grant of patent rights is the limit of freedom *from competition* under the cases first cited at note 22." 333 U.S. at 310 (Citations omitted and emphasis added.)

To the same effect is *United States v. New Wrinkle,* 342 U.S. 371 (1952), where a non-manufacturing patent holding company was held to be in violation of the antitrust laws by its attempt to fix prices at which its licensees might sell:

> "The Bement [*Bement v. National Harrow,* 186 U.S. 70] and *General Electric* cases allowed a patentee to license *a competitor* in commerce to make and vend with a price limitation controlled by the patentee." (Emphasis added.) 342 U.S. at 378.

Royal seems to ignore this important qualification of the *General Electric* decision. Royal's brief admits that, "In the case at bar, the patentee, Royal, does *not* engage in the manufacturing of the patented product." (Emphasis added) (App. Br. p. 25). Thus, Royal

was not a competitor of St. Regis. The trial court was aware of the important distinctions between the present case and the *General Electric* rationale. As it said in its well-reasoned opinion:

> "Thus, the question presents itself, where the patent owner does not compete with the licensee with respect to the patented product, is a price fixing agreement such as the one sought to be introduced in this case, 'normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.' We think not." [R. 23 in Appeal No. 22717].

For a similar holding see *United States v. Vehicular Parking,* 54 F. Supp. 828, 838 (D. Del. 1944).

Because of the above, it would seem that Royal's contention that there was "ample evidence in the record to support an inference that Royal had at least the power and in fact, did, set Plas-Ties prices" (App. Br. p. 18) must be rejected for, even if accepted, such a power is not within the limited exemption created by the *General Electric* decision.

However, the trial court, correctly ruled that, as a matter of law, Royal was estopped from asserting that it, rather than Plas-Ties, had the power to fix the prices at which the patented items might be sold. Royal cannot be heard to argue that the "corporate veil" of Plas-Ties should be pierced in order to protect Royal from the illegality of its price-fixing condition (see pp. 21-22 *supra*). As a result, it is a licensee, Plas-Ties, and not the patentee who had the power to set St. Regis' prices under the St. Regis license. Such a power, contrary to Royal's contentions that "[T]here is nothing

illegal in having the fixed price be determined by one particular licensee," (App. Br. p. 9) is not authorized by the *General Electric* decision or any other authority. As stated in the trial court's opinion:

> "Plaintiff's assertion that such an agreement is valid under the doctrine of the *General Electric* case and the *Huck* case [*U.S. v. Huck,* 227 F.Supp. 791 (E.D. Mich. 1964), aff. 382 U.S. 197 (1965)] is not sound. In each of the two latter cases the patentee entered into an agreement with its licensee that required the licensee to sell products made under the patent in question at a price no lower than that at which the patentee sold the same products. In the instant case, however, the oral agreement contended for by plaintiff would require defendant not to sell at the prices fixed by plaintiff but rather at the prices fixed by its competitor, to wit, Plas-Ties Corporation, also holding a license from plaintiff to manufacture under the patent." [R. 22 in Appeal No. 22717].

That such a power in a licensee is not within the *General Electric* doctrine is made even more clear by the Supreme Court decision in *Line Material Co., supra,* which was specifically relied upon by the trial court as "clearly" applicable to the case at bar. *Line Material* involved cross-licensing between the owner of the basic patent and the owner of the improvement patent, whereby the latter was empowered to license both patents at fixed prices. The Supreme Court held that permitting one patentee to fix the price of an article covered in part by a patent not owned by him was not within the *General Electric* rule. The instant case

can be analogized to the cross-licensing arrangment in *Line Material* and also to the patent-pooling arrangement declared illegal in *New Wrinkle, supra.* Although Plas-Ties did not own any patent to pool or cross-license, it did possess something equally as important: know-how. Royal and Plas-Ties combined these resources and jointly executed the agreement to license St. Regis. Under the agreement, Plas-Ties was given the power to fix prices of items covered by Royal's patent. It would seem, therefore, that the trial court was entirely correct when it said "[T]hus, the alleged price fixing agreement would seem to come clearly within the prohibition and reasoning of *United States v. Line Material Co.*" [R. 23 in Appeal No. 22717].

Despite the clear import of the last quoted passage from the trial court's opinion, and despite the Supreme Court decision in *Line Material,* Royal states that "[I]t is not clear from the Court's memorandum decision just what its reasoning was" with relation to the legality of having the licensee, Plas-Ties, fix the prices under the alleged oral agreement (App. Br. p. 26). Speculating upon this supposed lack of clarity, Royal suggests that perhaps the court found that the *"General Electric* doctrine is limited to one licensee" (App. Br. p. 26). Cited by Royal is *Newburgh Moire Co. v. Superior Moire,* 237 F. 2d 283 (3rd Cir. 1956), which held that the *General Electric* doctrine did not give a patentee the power to "grant a plurality of licenses, each containing provisions fixing the price at which the licensee might sell the product. . . ." 237 F. 2d at 294. Nowhere in the trial Court's opinion is there any indication that the *Newburgh Moire* case or the "single licensee" rule was utilized in reaching the decision (al-

though St. Regis did present such an argument to the trial court [R. 515]). By setting up this "straw man," Royal hopes to cloud the very clear holding that the *General Electric* and *Line Material* decisions do not authorize the license, Plas-Ties, to fix the prices of St. Regis.

The *General Electric* decision is not favored as an exemption from the antitrust laws. See *e.g.,* Kaysen and Turner, Antitrust Policy, p. 168 (1959); Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 233-236 (1955). It has no application to a situation where, as here, the patentee is not manufacturing or selling the patented item in competition with the licensee whose prices are being fixed. Accordingly, the price-fixing condition imposed by Royal has no economic or legal justification. It is a *per se* violation of the antitrust laws and hence unenforceable as a license condition.

V.

The Trial Court Complied With F.R.C.P. Rule 56 Re Finding That There Were No Material Disputed Facts Concerning the Defenses Upon Which the Summary Judgment Was Granted.

Royal claims that the trial court failed to comply with F.R.C.P. 56 because it allegedly did not comply "with the technical rule enunciated by this Court in *Neff Instrument Corporation v. Colu Electronic, Inc.,* (CA 9, 1959) 269 F. 2d 668 . . ." (App. Br. pp. 22-23). Royal's argument is without substance in view of the record and of the applicable law.

The Court's opinion below noted that it should stand as its findings and conclusions upon the motion for summary judgment. In that opinion the court found:

"There are no material facts which are in dispute upon the question as to whether or not defendant still has a valid license to use the patented process and the 'know-how'. Plaintiff's contentions that the validity of the patent is in issue need not be now reached.

". . .

"As stated before there are no material disputed facts herein for the purposes of the motion for summary judgment. . . . Assuming for the purposes of this motion that all of the facts stated in plaintiff's affidavits and exhibits are true and that there was an oral agreement between the parties in May 1963 that defendant would maintain its prices at a level fixed by Plas-Ties Corporation, and also assuming that in June 1966 defendant again agreed to maintain prices at the levels fixed by Plas-Ties Corporation, such price fixing agreement or agreements would have no legal effect and the breach thereof by defendant would not entitle plaintiff to terminate defendant's license for the reason that each of such price fixing agreements would be invalid under the Sherman and Clayton Acts for the reasons hereinbefore stated. In addition, the Court concludes that no authorized representative of defendant executed or approved any oral price fixing agreement in or about May of 1963; that the license agreement couldn't be terminated by the breach of a separate price fixing agreement; and that in any event the parol evidence rule prevents proof of any such 1963 oral agreement." [R. 17 and 26 in Appeal No. 22717].

There statements fully comply with the requirements of F.R.C.P. 56(c). Admittedly, a movant for summary judgment has a heavy burden, but this burden was fully met in the present case. The motion for summary judgment relied almost completely upon statements by Royal's own personnel, so that there was no issue of fact raised by conflicting affidavits.*

Thus, there was no occasion for the trial court to weigh conflicting evidence and it did not do so. Rather the ruling assumed the evidence to be as stated by Royal. In such circumstances, the trial court correctly determined that the defenses of license and of illegality of the alleged price-fixing condition were matters of law and could be determined by summary judgment.

Royal has failed to identify any fact actually material to the trial court's decision upon which there was any genuine dispute. It claims that some inferences drawn by the court may be disputed (see, for example, pp. 18-19 of Royal's Brief), but we have herein shown that each such inference is the only one which can logically be drawn from the undisputed facts. Logic and reason may be employed in deciding upon a motion for summary judgment, rather than only a mechanical, inflexible process, as vividly illustrated by the recent decision of the Supreme Court in *First National Bank of Arizona v. Cities Service Co.* (36 Law Week

*The only St. Regis affidavit relied upon by it in support of the motion for summary judgment was that of Mr. Adams, the president of St. Regis, regarding his lack of knowledge of any oral price-fixing agreement. Mr. Adams' affidavit was not contradicted by any affidavit or deposition of Royal.

4394—decided May 20, 1968). There the court utilized extensive inferences and innuendos concerning motive and intent to conspire, drawn by logic from a large mass of testimony, to uphold a summary judgment against a plaintiff who claimed that he was the victim of an anti-trust conspiracy. It held that F.R.C.P. 56 is to be realistically applied and that "a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him" (36 Law Week at 4404).

As to Royal's reliance upon the claimed "technical rule" of *Neff Instrument Corp., supra,* that there must be an express finding that "there is no genuine issue as to any material fact," any such technical rule has been disavowed by this Court. In *Fromberg, Inc. v. Gross Manufacturing Company, Inc.,* 328 F. 2d 803 (9th Cir. 1964), a patentee made the same argument of a "technical rule", in seeking to reverse a summary judgment against him. However, this court replied:

> "Appellant, however, says that the court made no express finding that there was no genuine issue as to any material fact and invokes the 'technical rule' that absent such a finding the judgment must be reversed. Apparently the notion that there is such a technical rule started with an impatient statement of Judge Fee, citing no authority, in *New and Used Auto Sales v. Hansen,* 9 Cir. 1957, 245 F.2d 951, a case in which this court found that there were genuine issues to be tried. There is similar, but somewhat weaker, language by Judge Mathews in *Sequoia Union High School Dist. v. United States,* 9 Cir. 1957, 245 F.2d 227. These dicta were repeated in the form of an alternative

holding in *Neff Instruments Corp. v. Cohu Electronics, Inc.*, 9 Cir. 1959, 269 F.2d 668, 674. Yet in each case the court was at pains to show that there were, in fact, genuine issues of material fact to be tried. How much repetition of dicta is required to make a holding, we need not here decide.

"The court is not required to make any finding in granting a motion for summary judgment. *Lindsey v. Leavy*, 9 Cir. 1945, 149 F.2d 899, 902. Such findings, however, are sometimes made, and when made they are helpful to the appellate court. In this case the court wrote an opinion and also made formal findings of fact and conclusions of law. The latter do not contain the ritual statement that there is no genuine issue as to any material fact. The opinion states: 'Defendant [appellee] urges that all the facts hereinabove stated are undisputed and that they establish noninfringement. With this conclusion we agree.' We think that, unless litigation is to be reduced to mere verbal ritualism, a prospect that we do not regard with any relish, this statement is equivalent to a statement that there is no genuine issue as to any material fact."* 328 F. 2d at 806.

The opinion of the trial court fulfilled any ritual required by F.R.C.P. 56(c).

Here the defenses of license and illegality are questions of law, and Royal presented to the trial court all the factual evidence it desired concerning those de-

*That patentee-appellant was also represented by the counsel for Royal in this action. Thus, it is surprising to see the argument made again.

fenses.* No dispute was raised by St. Regis as to those alleged facts and the court properly determined the issues of law on the assumption they were proved as alleged by plaintiffs. This is all that F.R.C.P. 56 requires.

VI.

The Holding That No Authorized Representative of St. Regis Made or Approved the Oral Price-Fixing Agreement Was Not Material to the Grounds for Summary Judgment, and Even if It Were, There Exists No Genuine Issue as to the Facts Supporting That Holding.

Section II of Royal's brief contends that the trial court erred "in holding as a matter of law that no authorized representative of appellee executed or approved the oral agreement to fix prices" (App. Br. pp. 14-18). Royal's argument is valid, however, only if the allegedly erroneous holding was a material fact in sustaining the defense of license and if there was a genuine issue as to it. Neither condition existed.

It seems clear from the memorandum opinion that the trial court's statements as to the necessity of approval of the license by authorized St. Regis officers and the ostensible authority of the negotiators were not material to the granting of summary judgment (and were not so treated by the trial court). The trial court rejected the validity of the price-fixing agreement on "*two* grounds, the first of which is the bar of the parol

---

*Royal has never claimed that there was any further evidence it could offer at trial on the defense of license. Thus, this case is more properly a subject for summary judgment than was *First National Bank of Arizona v. Cities Service Co., supra,* in which the plaintiff claimed that he was prevented from producing evidence to sustain his claim.

evidence rule" [R. 18-22 in Appeal No. 22717]. The second ground was the holding that the oral price-fixing agreement was in violation of the Sherman and Clayton antitrust acts [R. 22-24 in Appeal No. 22717]. These were the *two and only two* grounds used by the trial court in rejecting any legal effect and validity of the alleged oral price-fixing agreement. Lack of actual or ostensible authority was not a ground. The only mention by the trial court as to lack of the negotiators' authority to bind St. Regis was made while discussing the applicability of the parol evidence rule [R. 18-19 in Appeal No. 22717]. But this discussion was purely incidental to the holding that the license document was, as a matter of law, a complete integrated agreement, the terms of which could not be altered or added to by parol evidence [R. 18]. The court made it clear that the question of apparent authority was not material to its determination under the parol evidence rule when it stated:

> "At such meeting [May 1963] no corporate officer of defendant was present and there is no evidence that any corporate officer of defendant was present and there is no evidence that any corporate officer of defendant ever approved the so-called oral agreement intended for by plaintiff, although such approval would be required, *regardless of the parol evidence rule.*" (Emphasis added) [R. 19 in Appeal No. 22717].

However, assuming *arguendo* that the binding authority of the negotiators was a material fact to the holding applying the parol evidence rule, there exists no

genuine issue as to the existence of the facts showing lack of such authority. Royal is apparently making two contentions to the contrary.

First, Royal contends that three items of evidence "warrant an inference that the appropriate officials of St. Regis approved of and ratified the oral agreement" (App. Br. p. 16). However, none of the cited evidence warrants the inference so claimed by Royal. It in no way contradicts the affidavit of the president of St. Regis that he did not have knowledge of the alleged oral price-fixing condition until November 1966. Moreover, the deposition of Johnson (Royal's president) indicates clearly that Royal and Plas-Ties knew and understood throughout the entire negotiations that the Pollock negotiators did not have the authority to enter into a binding agreement for St. Regis. Finally, it cannot be argued that maintenance by St. Regis of its prices in line with those of Plas-Ties until early 1966 is evidence of adoption or ratification by St. Regis' officers of a price-fixing agreement. It is natural that a manufacturer learning to make a product for which a competitor has a long-established price level will not cut prices until he knows he can make a profit at a lower price level. When he gains sufficient experience to ascertain this, he reduces prices to gain more business. That is precisely the pattern followed by St. Regis here.

Second, Royal contends that there is a genuine issue of material fact because, it claims, St. Regis clothed

the Pollock negotiators with ostensible authority to make a binding agreement. Royal's brief quotes extensively from Cal. Jur. 2d on the law of agency and ostensible authority (App. Br. p. 17). But that quoted passage of text shows the fallacy of Royal's contention, because it states:

> ". . . an ostensible agency exists where the business done by the supposed agent, so far as it is open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, *the party dealt with is justified in believing that an agency exists.*" (Emphasis added).

Such belief cannot be justified when the third party understands and acknowledges that the principal must approve and ratify an agreement negotiated by the agent. Here there is ample evidence from Royal that it understood at all times that the Pollock negotiators did not have the authority to bind St. Regis and that final review and approval had to be made in New York by the president of St. Regis [Johnson Dep. pp. 36, 41, 44-46, 100; see also Exs. D-10, D-12, D-15 and D-16A thereto].

Therefore, there was no error in the statements of the trial court that no authorized representative of St. Regis executed or approved a price-fixing condition. Such statements, in any event, were not material to the grounds of the decision.

VII.

A Preliminary Injunction Was Properly Denied.

Although Royal's first appeal is from the denial of a preliminary injunction, it has for all intents and purposes now abandoned that appeal (App. Br. p. 27). This is understandable, because the summary judgment renders the issue moot.

In any event, it was entirely proper for the court below to refuse to issue any preliminary injunction. There was no abuse of discretion whatsoever, as shown by the thoughtful nature of the order of denial [R. 530-533]. The authorities supporting the court's order include *Pacific Cage & Screen Co. v. Continental Cage Corp.,* 259 F. 2d 87 (9th Cir. 1958); *Leavitt v. McBee Co.,* 124 F. 2d 938 (1st Cir. 1942); and *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F. 2d 804 (9th Cir. 1963). A full argument of the equitable principles compelling denial of a preliminary injunction under the facts of this case is found in St. Regis' memorandum in opposition [R. 247-260].

Conclusion.

This case does not warrant a trial. If it went to trial, the court would have to determine two questions of law upon the basis of the very same evidence offered by Royal here— (1) is the written license an integrated agreement, the terms of which cannot be enlarged or altered by evidence of an oral agreement, and violation of the antitrust laws? It is in the best interests of justice to determine these questions of law

at a pre-trial stage, before involving the court, the parties and counsel in the time and expense of trial. Summary judgment was, therefore, properly sought and granted. The judgment should be affirmed.

O'Melveny & Myers,
Bennett W. Priest,
By Bennett W. Priest,
Attorneys for Appellee,
St. Regis Paper Company.

Of Counsel:
Ward, McElhannon,
Brooks & Fitzpatrick,
Stuart A. White,
Nicholas L. Coch.

Nos. 22456 and 22717

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDUSTRIES, a corporation,

Appellant,

vs.

ST. REGIS PAPER COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

CHRISTIE, PARKER & HALE,
and
NEWELL & CHESTER,
By ROBERT M. NEWELL,
650 South Grand Avenue,
Los Angeles, Calif. 90017,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

APPELLANT'S REPLY BRIEF.

The appellee has filed an excellent brief had the judgment appealed from been rendered by the District Court after having heard all of the evidence. However, it fails to deal as penetratingly with the appellant's contention that, in granting the motion for summary judgment, the District Court necessarily decided certain questions of fact, which properly should have been decided only after the Court had heard all of the evidence. Appellant proposes to reply to appellee's points in the order they appear in the appellee's brief and will discuss questions of fact where appropriate in the setting of the reply to a particular point.

I.
The Parol Evidence Rule.

Each side has cited California cases dealing with the parol evidence rule containing language favorable to the party citing the particular cases. Seemingly the statements are irreconcilable. However, upon analysis and in the light of the facts of a given case, the decisions are not in as much disharmony as the quoted excerpts suggest. Moreover, they clearly indicate that the law of California on the parol evidence rule has evolved to the point today where the trial court should hear testimony about the alleged contemporaneous agreement before it can determine whether or not the parol evidence rule applies. At least, that is the holding of the most recent expression by the California Supreme Court on the matter, *Mastersen v. Sine* (February 1968) 68 A.C. 223.

Indeed the argument of St. Regis is itself persuasive proof that the applicability of the parol evidence rule in the case at bar could be determined only after the trial court heard all of the evidence and made a factual determination as to what was "natural" or "unnatural." For example, on page 15 of its brief appellee states:

> (a) "In these circumstances, it would be *unnatural* for Royal to make this matter a subject of separate, oral understanding . . ."
>
> (b) "Further, it would be *unnatural* for Royal to leave this as a matter for separate, oral understanding in view of the unwavering view taken by the Pollack Paper negotiations . . ."
>
> (c) "Faced with that attitude, Royal's *obvious protection* would be to insist that the alleged condition be explicitly in the writing . . ."

The italicized words in the preceding quotation represent value judgments which the trier of fact could properly make only after it had heard all of the evidence. It should not attempt to make such subjective determinations on summary judgment.

In attempting to overcome Mastersen, counsel are consistent in their language. On page 16, they state:

> (a) "In *Mastersen,* it was determined that an oral contemporaneous agreement was on a subject on which the written agreement was silent and that it was *natural* for the parties to make the agreement separate from writing.
>
> (b) Referring to *American Industrial Sales Corp. v. Airscope, Inc.,* 44 Cal. 2d 393, 282 P. 2d 504:
>
> ". . . the Court expressly affirmed those tests for invoking the exception, and held that the oral agreement . . . was a *natural* subject of oral, separate, contemporaneous understanding."

Perhaps all of what counsel say is true as a *matter of fact,* but that can be determined only after all of the evidence is in. California law on the question of whether the parol evidence rule prohibits testimony of an alleged contemporaneous agreement requires that the oral agreement at least be considered. The District Court's decision (which are its findings of fact and conclusions of law) states: "It does not appear to this Court that parties similarly situated would make a price fixing agreement a separate agreement." St. Regis handles this in its only footnote which appears on page 15 of its brief. Appellee states: "It is a conclusion that must be drawn from the uncontroverted words of

the document and *Royal's own testimony as to the circumstances of its execution.*"

On summary judgment, the question is not what conclusion "must" be drawn. Rather, it is whether that is the *only* conclusion that can possibly be drawn from the evidence. Mr. Johnson, Royal's president, testified about this phase of the negotiations on pages 37-40 of his deposition. His testimony was to the effect that Royal insisted upon a price fixing agreement, otherwise ". . . we simply can't reach an agreement." St. Regis was willing to agree to price fixing but one of its counsel, Mr. Ganey, ". . . would not, absolutely, let them write it in the agreement." Accordingly, if Mr. Johnson's testimony be accepted as true, as it must on summary judgment, the *only* way the parties could enter into the licensing agreement was if there was a contemporaneous, oral price fixing agreement. Hence, the statement of the Court referred to above was clearly not the only inference that could be drawn from the evidence. Indeed, in the absence of any contrary evidence, the District Court's finding of fact is not supported by the evidence.

Under its discussion of the parol evidence rule, St. Regis has thrown in the point that the alleged termination of the agreement by Royal was ineffective because a breach of the oral price fixing agreement was not specified in the license agreement. This proposition is of no consequence whatsoever on summary judgment. Appellee concedes: "At best, Royal's remedy would be one at law for damages." That would be better than being thrown out of court together, which is what the District Court did to Royal. If the latter was entitled to any relief, irrespective of the validity of

the termination notice, summary judgment for the appellee was erroneous.

II.
Did Plas-Ties Have to Join in the Termination Notice?

This point really has no bearing on the propriety of summary judgment against Royal. If there was a valid contemporaneous, oral price fixing agreement which was breached by St. Regis, Royal is entitled to some form of judicial relief. It should not be summarily refused a hearing. Whether Plas-Ties was required to join in a termination notice is beside the point.

However, whether the appellee is correct in its assertion can be determined only after the Court has heard all of the evidence and decided the facts. For example, St. Regis flatly states that "Plas-Ties owned only the know how" (Brief, p. 19). St. Regis cites Mr. Johnson's testimony as proof of this fact. On the other hand, the license agreement reads:

"RECITALS

> ROYAL has designed and developed a product line of plastic tie strips and *is the owner of* United States Patent No. 2,767,113, pending patent applications *and know how* pertaining to the design, manufacture, and machines and equipment for making plastic tie strips and for closing containers with said tie strips.
>
> POLLOCK is desirous of manufacturing, using and selling the aforesaid product line and of acquiring a license under the patent rights *and know how owned by ROYAL* . . .

3. ROYAL shall make available to POLLOCK the *know how now owned by ROYAL* relating to said tie strips . . ." (Emphasis added).

It is suggested that the aforementioned statements, all agreed to by Royal, Plas-Ties, and St. Regis support an inference that Royal owned the know how. Accordingly, on summary judgment the District Court erred in finding that: "Actually, the second count makes clear that the 'know how' is the know how of Plas-Ties Corporation . . ." [R. p. 15, appeal 22717].

The Court should have drawn the inferences most favorable to appellant in considering the motion for summary judgment. If it had done so, it would have not become enmeshed in endeavoring to rule as a matter of law on the factual question of the nature of the relationship between Royal and its subsidiary Plas-Ties, which was a necessary prerequisite to the Court's passing upon the antitrust defense of appellee.

III.

The Oral Price Fixing Agreement Did Not Violate the Anti-Trust Laws.

St. Regis asserts that the rule of *General Electric* does not apply to a non-manufacturing patentee which has required a second licensee to set its prices in accordance with those of the first license. No authority is cited for this point. Rather the appellee analogizes the case at bar to *United States v. Line Material,* 333 U.S. 287. This reasoning is of dubious validity as an original proposition; furthermore, in the case at issue, it overlooks the fact that there was evidence in the record which would have supported a finding that Royal so controlled the affairs of Plas-Ties that it was Royal not Plas-Ties which set the price of the plastic

tie strips. Therefore, the District Court erred on summary judgment in finding that: "Plaintiff in its complaint entitled Plas-Ties as a division of plaintiff when in fact Plas-Ties is a completely separate entity" [R. p. 15] and by implication that Plas-Ties set its own prices.

The evidence warranted a finding that Plas-Ties was not "a completely separate entity." Mr. Johnson testified that, although Plas-Ties was a subsidiary of Royal it was operated as a division thereof; that the corporate staff of Royal worked directly on Plas-Ties' affairs; and that Plas-Ties was "in actuality a part of Royal Industries, though it has the name 'subsidiary'" [Johnson's Dep. p. 99]. As a matter of fact, Royal's divisions and subsidiaries were operated on an identical basis by Royal [Johnson's Dep. pp. 112-113]. Johnson testified:

> "In these operations we have either divisional general managers or divisional presidents who are day-to-day men on the scene, but our corporate staff, myself, our comptroller, our vice president, spend a great deal of time in the divisions, working directly with them."

This evidence of Royal's total control over and direction of Plas-Ties' affairs is such that the trier of fact could conclude that Royal set Plas-Ties' prices. Indeed, when the first breach by St. Regis of the price fixing agreement was brought to the attention of Mr. Johnson he wrote to the President of the Pollock division of St. Regis on October 26, 1966, and said:

> "We find, however, that in spite of our admonishments of your pricing action an acquiescence on our requests, you have continued to price *our* product below the price which you have agreed to main-

> tain, and below the price we find can be profitable to *our* company." (Emphasis added). [Johnson's Dep. Ex. 21].

Moreover, St. Regis in its letter of January 24, 1967 [Johnson's Dep. Ex. 22] recognized that the price pattern was Royal's, not Plas-Ties.' The author write:

> "As stated in Mr. Lacy's letter to Mr. Johnson of December 2, 1966, St. Regis denies the making of any agreement to adhere to prices fixed *by Royal.*
>
> "If Royal had expected St. Regis to follow *its* prices, it is hard to understand why they never advised St. Regis that price revisions were being made *by Royal* . . ." (Emphasis added).

Quite clearly the parties to the contract recognized that the prices were set by Royal. Plas-Ties is never mentioned. Of at least, such an inference is permissible from the evidence. Plas-Ties paid no royalty to Royal for use of the patent [Johnson's Dep. p. 8]. It is repetitive to be sure, but the law on summary judgment is not what inferences should be drawn but what could be drawn from the evidence. Possible inferences include the deduction that Plas-Ties was not a "completely separate entity from Royal" and/or that, irrespective of the relationship between Royal and Plas-Ties, Royal set the prices to be charged by Plas-Ties for the plastic tie strips.

Therefore, the Court was in error in determining, *as a matter of law,* that Plast-Ties was a separate entity from Royal. Since the facts have supported a contrary inference, it necessarily follows that the alleged contemporaneous oral price fixing agreement would have been proper under the *General Electric* doctrine.

Even if the finding of the District Court that Plas-Ties was an entirely separate entity from Royal is deemed to be the only permissible inference from the evidence, the District Court is in error in holding that such a finding compels the conclusion that the alleged price fixing agreement violated the anti-trust laws. The reasoning of the District Court is based upon the assumption that the right of a patentee to protect his monopoly is limited to requiring a licensee to fix its prices in accordance with those of the patentee. This means that the price fixing protection afforded a patentee would be available only to those patentees who manufacture the patented item and that a patentee who has chosen to market his product through licensees would never be legally permitted to compel a second licensee to fix its prices in accordance with those charged by a first licensee. The Appellee makes this assertion without the benefit of supporting authority. As far as the appellant can determine, this fact situation has never been passed upon by any court in this Circuit.

On the other hand, the United States District Court in Missouri in *Ronson Patents Corp. et al. v. Sparklets Devices, Inc. et al.* (USDA-Mo. 1953) 112 F. Supp. 676, involved a factual situation quite similar to those in the case at bar.

> "The plaintiff Ronson held the patents in suit assigned to it by Art Metal under which Art Metal manufactured the patented articles. The plaintiff Ronson did not manufacture but was a subsidiary of the manufacturer, Art Metal. The defendants in the Ronson situation attempted to show the illegal control of the marketplace by reference to an agreement between Ronson and one Evans (not

a party to the suit) based on a license agreement including a minimum price-fixing provision. The defendant argued that the agreements fixing prices were illegal since they tended to create a monopoly in the plaintiff Ronson. On page 686 the court disposed of this contention as follows:

> '. . . There is no substantial evidence that by the agreements Art Metal and Evans divided up the market, to any competitor's damage. Art Metal had a large market prior to the agreements by virtue of the character of its product and patent. Art Metal licensed Evans to manufacture and sell under its patent. This Art Metal had a legal right to do. As to plaintiffs' right to fix the selling price of the patented article under the license, we are bound by the General Electric case. *United States v. General Electric Co.*, 272 U.S. 476, 47 S. Ct. 192, 71 L. Ed. 362.' "

General Electric gives a patentee the right to require its licensees to comply with any price structure the patentee feels is best suited to effect the best exploitation of its product. *General Electric* does not in any way limit the standards by which the patentee determines its prices. Appellant knows of no reason why a non-manufacturing patentee cannot delegate the responsibility of pricing to a primary licensee and insist that, if any third party wishes to manufacture the patented item under a license, it must follow the prices of the first licensee. This is an original proposition in this Circuit. None of the cases cited by the appellee are persuasive authority to the effect that it is only a manufacturing patentee who may fix prices under *General*

Electric. Yet, that is a necessary limitation of the *General Electric* rule that the decision of the District Court imposes upon that doctrine.

IV.

The Authority of the Appellee's Negotiators.

The appellee beats this point around by conceding that it was "not material to the grounds for summary judgment," but then discusses at some length the fact that the District Court drew the only possible inference from the evidence that the Pollock negotiators "did not have the authority to enter into a binding agreement for St. Regis" (Appellee's Br. p. 36). The ultimate wisdom of this deduction is supposedly cemented by the appellee's reference to what is "natural" for a manufacturer. (It is difficult to imagine any concept that more emphatically involves a determination of fact than to praise a trier of fact for having figured out what is "natural".)

At the very least, the authority of the Pollock negotiators was ambiguous. Appellee states that everyone knew that the license agreement had to be signed by a St. Regis official. On the other hand, the Pollock negotiators assured Royal that the execution of the agreement by the St. Regis people in New York was a mere formality [Johnson's Dep. p. 100]. What is even more astonishing, if the lack of authority of the lackeys from the Pollock Paper division of St. Regis be assumed, is the fact that they had the authority to, and did in fact, give Royal $20,000.00 down before the license agreement was formally signed in order to be exposed to Royal's know how [Johnson's Dep. pp. 91-92]. To say the negotiators had no authority to make a deal without "final review and approval" from New York

(which, incidentally, ratified the agreement in the middle of May 1963 as of the first day of May 1963) and to admit that they had the authority to give Royal $20,000 in order to get things moving along is to speak with a forked tongue in stating that there was only one possible inference from the evidence.

The nature and extent of the authority of the Pollock people and whether St. Regis is estopped to question their authority is a question of fact which properly should have been decided in the light of all of the evidence. In view of the fact that one *possible* inference was that the Pollock people had full authority to bind St. Regis notwithstanding the formality of a signature in New York, the District Court erred in finding *as a matter of law* that approval of a corporate officer "would be required."

Conclusion.

The posture of the parties before the Court is aptly demonstrated by the briefs. Appellee has discussed with wisdom and logic the reasoning of the District Court and concludes that the Court sagely determined that which was "natural" and that which was "unnatural." It has carefully analyzed the reasoning of the District Court and found to be eminently satisfactory.

On the other hand, the appellant has not questioned the soundness of the deductions made by the District Court; rather, it has endeavored to demonstrate to this Court that, irrespective of the logic of the District Court in reaching the conclusions it did, other contrary

inferences were at least *possible* from the evidence. To the extent that it has succeeded summary judgment was improperly granted by the District Court.

The judgment should be reversed in order that the Court might hear all of the evidence before making determinations of fact.

Respectfully submitted,

CHRISTIE, PARKER & HALE,

and

NEWELL & CHESTER,

By ROBERT M. NEWELL,

Attorneys for Appellant.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. FRANK KARL SELBY, STEVEN ARTHUR CLARK, PAUL EVANS CARBONE, CAROL NALANI PALMIERI, and ELAINE ROSE FODOR, *Appellees.*	No. 22,719

On Appeal from An Order of

The United States District Court

For the District of Arizona

OPENING BRIEF OF APPELLANT

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellant

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On Appeal from An Order of
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OPENING BRIEF OF APPELLANT

1.

JURISDICTIONAL STATEMENT OF FACT

This case was instituted by the filing of an Indictment which was returned by the Federal Grand Jury on November 8, 1967. (Clerk's Record on Appeal, Item 1. Hereinafter the Clerk's Record on Appeal will be referred to as "RC"; the

reporter's transcript of the testimony at the hearing on the Motion to Suppress will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line. The Appelles, Frank Karl Selby, Steven Arthur Clark, Paul Evans Carbone, Carol Nalani Palmieri and Elaine Rose Fodor will be referred to by their surnames or as "Appellees.")

The Indictment, in two counts, charged all Appellees in Count I with having formed a conspiracy sometime prior to October 27, 1967, and continuing thereafter until on or about October 27, 1967, at Lukeville, State and District of Arizona, and elsewhere to import, receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 332 pounds of bulk marijuana after the said marijuana had been brought into the United States of America from Mexico contrary to law, knowing the same had been imported and brought into the United States contrary to law; all in violation of 21 U.S.C. §176a. The second count charged Selby and Palmieri with having knowingly and with intent to defraud the United States of America, imported approximately 332 pounds of bulk marijuana contrary to law at Lukeville, Arizona, all in violation of 21 U.S.C. §176a (RC Item 1).

On November 17, 1967, Selby, Clark, and Carbone filed a motion to reduce bail. (RC Item 9, docket entries) (On November 1, 1967, Fodor and Palmieri were released on personal surety bonds.) On November 20, 1967, all Appellees were arraigned, pleaded not guilty, were allowed ten days for Motions, and the said motion was denied. (RC Item 9) Trial was set for December 27, 1967. On December 5, 1967, Appellees filed a Motion to Continue. (RC Item 9) On December 8, 1967, the Government filed a Memorandum in Opposition and on December 11, 1967, the Motion was

denied. (RC Item 9) On December 6, 1967, Clark was released on $10,000 bond secured by a 10% deposit and on December 11, 1967, Carbone was released on $10,000 bond secured by a 10% deposit. (RC Item 9)

On December 22, 1967, Appellees filed a Motion for Return of Property and to Suppress. (RC Item 2) On December 27, 1967, the Government filed a Memorandum in Opposition and the Motion was heard. (RC Item 4 and 9) The Trial Court granted the motion, and the Government moved to reduce Selby's bail to $10,000 personal surety and was released. (RC Item 9)

The Government filed Notice of Appeal on January 26, 1968 (RC Item 6), and avowed the purpose of the Appeal is not for delay. (RC Item 6, L 20-21)

The Trial Court had jurisdiction of the case by reason of the provisions of 18 U.S.C.A. §3231. The Government is authorized to appeal orders granting motions to suppress by the provisions of 18 U.S.C. §1404. This Court has jurisdiction of this Appeal by reason of the provisions of 28 U.S.C.A. §1294 (1).

Jo Ann D. Diamos avows this Appeal is not for the purpose of delay.

II.

STATEMENT OF FACTS

Selby and Palmieri drove a camper up to the Port of Entry at Lukeville, Arizona, at approximately noon on October 27, 1967, and told the customs inspector on duty that they were vacationing and going to Mazatlan, Mexico and needed an affidavit in order to obtain a Mexican Tourist car permit. They stated that they wished to enter the United States briefly so

that they could have the affidavit witnessed by a notary public whose office was in a trailer park a short distance from the port, and the inspector permitted them to pass after a cursory examination of the inside of the camper. (RT 56, L 1-14) (This is a town having a population of 40 people which is under the investigative jurisdiction of the Nogales Office of the U.S. Customs Agency Service. It cannot be reached directly from Nogales by car. The highway connection is from Nogales to 4 miles south of Tucson, west to Ajo, and south to Lukeville, a distance of approximately 160 miles. There are no law enforcement officers of any level of government in Lukeville.)

As the camper pulled away, the other three Appellees drove up to the port in a Volkswagon, stated they had nothing to declare, were cleared after their names were noted, and then parked across the street. The camper had meanwhile gone into the trailer court, but when it came out, instead of returning to the border, it turned and started north. The Volkswagon pulled out immediately and followed it. (RT 60-66)

The Port Director called his superior in the Nogales Customs Office and asked him if he knew any of the five people who had passed through in the camper and the Volkswagon. (RT 92) The Nogales agent stated that, while he had been working in the Orange County, California police department and in the Customs Agency there, four of the persons named (excluding Palmieri) had been arrested for marijuana violations. RT 137-140) He then ordered the Port Director to call the Sheriff's Office in Ajo, a town about forty miles north of Lukeville, and ask him to stop the two cars and bring the occupants back to the port so that they could be given the opportunity to register in accordance with 18 U.S.C. §1407 and so that the camper could be searched. (RT 137-140)

The cars were stopped by deputy sheriffs near Ajo forty-five minutes to an hour later, and the Appellees, driving their own vehicles, were escorted back to Lukeville. (RT 13) There the Port Director told them of the registration requirements, and all of the Appellees stated that they did not have to register. (RT 100) While this was being done (RT 180, L 13-17), one of the inspectors then went up to the camper and knocked on the passenger-side door, and when it sounded strange, he sniffed at the window opening and detected what he thought was the odor of marijuana. (RT 76-77) Thereupon, the door panel was removed, and the several bricks of marijuana were discovered. (RT 98) The camper was then searched and additional bricks were found. (RT 98)

III.

SPECIFICATION OF ERRORS

The Court erred in granting Appellees' Motion for Return of Property and to Suppress Evidence since the search was based on probable cause.

IV.

ARGUMENT

"The facts and circumstances within their knowledge and of which they had reasonably trustworthy infomation were sufficient in themselves to warrant a man of reasonable caution in the belief" that Appellees were, when searched, possessed of illegal contraband.

Appellees' Motion for Return of Property and to Suppress

Evidence based the motion on the provisions of Rule 41(e), Federal Rules of Criminal Procedure, 18 U.S.C.A. (RC Item 2, 1, L 24-27)

The Government's Memorandum in Opposition relied on Border search and on probable cause for the search. (RC Item 4, 2, L 3-9)

The Court at the hearing of the Motion to Suppress, rejected the Government's theory of Border search (RT 157, L 5-6) and did not find probable cause for the detention of the vehicles and return to the border. (RT 160, L 10-11)

The two vehicles entered separately. The second car parked across the street and waited until the camper, the first vehicle, left the trailer park and headed north. It then headed north. The first vehicle's occupants stated to the inspector they were headed for Mazatlan, Mexico, but needed an affidavit executed to obtain a Mexican Tourist Car Permit. Instead of returning the vehicle headed north.

The inspector had noted the names of both vehicles, and when the inspector called the Customs Agency Office in Nogales, Arizona, he informed Customs Agent Hugh Marshall of the five names and the actions of the two vehicles:

> "A Mr. Ramsey in essence advised me of the fact that a Chevrolet camper bus being driven by a man by the name of Frank Selby, and he said had a girl in there, a Hawaiian girl, he thought her name was Palmere, something to that effect, had entered from Mexico, Sonora, at the port of entry at Lukeville, had requested to go to the notary public's office, which is located approximately two or three blocks north of the port to get some papers notarized so they could effect a journey itno Mazatlan, that Mexican Customs required they have some notarized papers on the vehicle. And that they, "they" meaning apparently he or his office had permitted this vehicle with Mr. Selby and Miss, as he put it, Palmere, to proceed. He said right

behind it came a VW bus and this VW bus also had California plates and said it was driven by Mr. Clark, occupied by Rose Fodor and Carbone, Paul Carbone in the back sleeping. He advised that they went through the bus a little bit, searched it down a little bit and permitted it to proceed. They watched it and as they watched the bus go across the street, stop, remain for a few moments and at that time they began to wonder about the camper pick-up which was supposed to return and at that time they noticed the camper pick-up come out of the trailer court where the notary was and proceed north without returning. They said at that very same moment that the VW left its parked position and appeared to catch up with the camper bus and both vehicles to proceed north out of sight. That would be the essence of the conversation." (RT 138, L 24 to 140, L 1)

Agent Marshall knew through his previous duty station, that Selby, Clark and Fodor had been arrested for possession of marijuana and whose trials had been pending when he left. (RT 140) He had information that Carbone was smuggling marijuana from Tijuana. (RT 143, L 24 to 144, L 5)

Marshall ordered Ramsey to have the cars intercepted in Ajo by the Sheriff's office and to have them returned to be checked out and to afford the occupants an opportunity to register. (RT 140, L 17-18)

Inspector Ramsey intended to search the camper when it was returned. (RT 100, L 5-6)

Title 19, U.S.C.A. §1461 provides that persons entering the country shall open their baggage and vehicles for customs inspection.

Title 19 U.S.C.A. §482 authorizes officers to stop and search vehicles both within and without their districts in which they may have a reasonable cause to suspect there is merchandise which was imported contrary to law.

When the Inspector sniffed at the door of the camper, he smelled what he believed to be marijuana.

As was held in *Carroll v. United States* (1925) 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280; *Brinegar v. United States* (1949) 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, probable cause provides independent grounds for the search of a vehicle.

Vehicles carring contraband are subject to seizure, 19 U.S.C.A., §1595a.

In *Sirimarco v. United States* (10th Cir., 1963) 315 F.2d 699, the defendant was arrested by New Mexico police on the request of Colorado authorities with whom a complaint had been filed charging him with passing a counterfeit note. When he was returned to Colorado and placed in the custody of state officials, a Secret Service agent was called in to inspect the alleged counterfeit bill. He confirmed that it was counterfeit and then searched defendant's car, discovering twenty-nine more bills hidden under the front seat. The court held that the agent had probable cause to believe that the car had been used to transport counterfeit bills and that, since he had the right to seize the car, the search was lawful even though he did not first assert formal control over it.

Title 19 U.S.C.A. §1595a provides:

> "(a) Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment."

The cars were subject to seizure.

In *Bailey v. United States* (5th Cir., 1967) 386 F.2d 1, at pages 2-3, the Fifth Circuit held:

> "As this was a warrantless search not incident to an arrest, the government either must have a finding that probable cause existed or must excuse its absence by resort to the border search doctrine. No case has held that one who has not crossed an international boundary can be the object of a constitutionally permissible border search, and we do not reach that question. Rather, we assume the view of the searching officers, and hold that 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief' that appellants were, when searched, possessed of illegal narcotics."

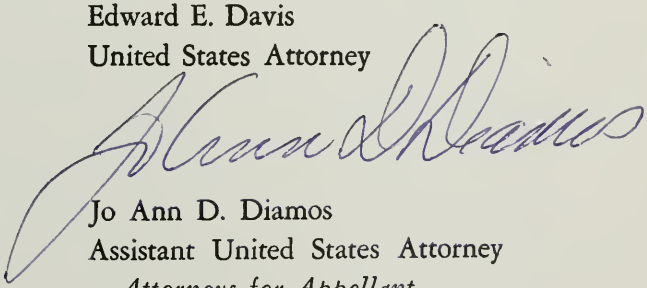
V.

CONCLUSION

It is respectfully submitted that there was probable cause to search the vehicles, and the Order granting the Appellees' Motion for Return of Property and to Suppress Evidence should be reversed.

Respectfully submitted,

Edward E. Davis
United States Attorney



Jo Ann D. Diamos
Assistant United States Attorney
Attorneys for Appellant

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Jo Ann D. Diamos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this ...1st... day of May, 1968, to:

William L. Berlat
509 Arizona Land Title Bldg.
Tucson, Arizona
Attorney for Appellees

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUL [illegible]8

UNITED STATES OF AMERICA, Appellant, vs. FRANK EARL STAY, STEVEN ARTHUR CLARK, CAROL EVANS CARROLL, CAROL MALATI PALUMBI, and CLAIRE ROSE FODOR, Appellees.	No. 22,719

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLEE

GLENN LESTER
Santa Ana, California

GEORGE H. CHULA
Santa Ana, California

WILLIAM L. BERLAT
Tucson, Arizona

Attorneys for Appellees

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TABLE OF AUTHORITIES

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IN THE

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FRANK KARL SELBY,	)	
STEVEN ARTHUR CLARK,	)	
PAUL EVANS CARBONE,	)	No. 22,719
CAROL NALANI PALMIERI,	)	
and ELAINE ROSE FODOR, Appellees.	)	

On Appeal from An Order of

The United States District Court

For the District of Arizona

OPENING BRIEF OF APPELLEES

I

STATEMENT OF THE CASE

This case was instituted by the filing of a complaint with the U.S. Commissioner on the 28th day of October, 1967. The complaint charged all appellees with violation of 21 U.S C.A. 176a (Conspiracy to import marijuana into the United States.) (Hereinafter the Clerk's Record on Appeal will be referred to as "RC"; the reporter's transcript of the testimony at the hearing on the Motion to suppress will be referred to as "RT", the number following will refer to the page, and the number following "L" will refer to the line. The appellees, Frank Karl Selby, Steven Arthur Clark, Paul Evans Carbone, Carol Nalani Palmieri and Elaine Rose Fodor will be referred to by their surnames or as "Appellees.")

On November 1, 1967, all appellees and their counsel were present for arraignment by the U.S. Commissioner at

which time they entered pleas of not guilty and the matter was set for preliminary examination on November 3, 1967. Appellees Fodor and Palmieri were released on November 1, 1967 on personal surety bonds. On November 3, 1967, preliminary examination was started before Raymond Terlizzi, U.S. Commissioner, at which time evidence was introduced on behalf of the Government and the preliminary examination recessed. Over the objection of all appellees and their counsel the hearing was continued to November 9, 1967, at the request of the Government. On November 8, 1967, an indictment was returned by the Federal grand jury. RC Item 1.

The Indictment, in two counts, charged all Appellees in Count I with having formed a conspiracy sometime prior to October 27, 1967, and continuing thereafter until on or about October 27, 1967, at Lukeville, State and District of Arizona and elsewhere to import, receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 332 pounds of bulk marijuana after the said marijuana had been brought into the United States of America from Mexico contrary to law, knowing the same had been imported and brought into the United States contrary to law; all in violation of 21 U.S.C. 176a. The second count charged Selby and Palmieri with having knowingly and with intent to defraud the United States of America, imported approximately 332 pounds of bulk marijuana contrary to law at Lukeville, Arizona, all in violation of 21 U.S.C. 176a (RC Item I).

On November 17, 1967, Selby, Clark, and Carbone filed a motion to reduce bail. (RC Item 9, docket entries) (On November 1, 1967, Fodor and Palmieri were released on personal surety bonds.) On November 20, 1967, all Appellees were arraigned, pleaded not guilty, were allowed ten days for Motions, and the said motion was denied. (RC Item 9) Trial was set for December 27, 1967. On December 5, 1967, Appellees filed a Motion to Continue. (RC Item 9) On December 8, 1967,

the Government filed a Memorandum in Opposition and on December 11, 1967, the Motion was denied. (RC Item 9) On December 6, 1967, Clark was released on $10,000 bond secured by a 10% deposit and on December 11, 1967, Carbone was released on $10,000 bond secured by a 10% deposit. (RC Item 9) On December 22, 1967, Appellees filed a Motion for Return of Property and to Suppress. (RC Item 2) On December 27, 1967, the Government filed a Memorandum in Opposition and the Motion was heard. (RC Item 4 and 9) The Trial Court granted the motion, and the Government moved to reduce Selby's bail to $10,000 personal surety and was released. (RC Item 9) The Government filed Notice of Appeal on January 26, 1968 (RC Item 6), and avowed the purpose of the Appeal is not for delay. (RC Item 6, L 20-21)

The Trial Court had jurisdiction of the case by reason of the provisions of 18 U.S.C.A. 3231. The Government is authorized to appeal orders granting motions to suppress by the provisions of 28 U.S.C.A. 1294 (1).

II

STATEMENT OF FACTS

On October 27, 1967, appellees Selby and Palmieri drove their camper to the Port of Entry, Lukeville, Arizona. After inspection of their vehicle by Inspector McKeown, they were admitted into the United States. The customs agent testified that Mr. Selby asked him where they could locate a notary as it was necessary to secure an affidavit of ownership prior to re-entering Mexico. The agent directed them to a notary and they drove off in that direction. (RT 53-61)

At about this time Willis Ramsey, the Port Director, returned from lunch and along with Inspector McKeown, conducted the search of the Clark Volkswagon, which was waiting to enter the United States. Nothing was found as a result of the search and the vehicle was allowed to pass the border. Inside the Clark Volkswagon were Clark, Fodor, and [illegible].

Carbone. (RT 61-64)

The Clark vehicle proceeded to a gas station on the west side of the highway while the area to which the Selby vehicle went is located on the east side of the highway. At no time was there ever any observation by anyone that the vehicles or their occupants ever met or communicated with each other. The Selby vehicle, after going to the notary, returned to the highway and went north. Approximately three to five minutes later the Volkswagon left the gas station and also headed north. (It should be noted that there is only one highway leaving Lukeville and it was on this road that both vehicles traveled). (RT 64-67) It was also at this time that Inspector McKeown talked over the matter of the camper traveling north instead of south as Mr. Selby had indicated was his intention. Inspector Ramsey thereupon phoned his supervisor in Nogales and talked to Mr. Hugh Marshall, an inspector for U.S. Customs Service. At that time Mr. Marshall told Mr. Ramsey that he believed Mr. Selby and Mr. Clark and Miss Fodor were subject to registration as narcotic violators and that they should be brought back to the border to allow them to register. Inspector Ramsey then radioed the Pima County Sheriff's station to intercept the vehicles and return them to Lukeville. The vehicles were then stopped by Deputy Sheriffs on the road to Ajo 45 minutes to one hour later and were escorted back to the border station. (RT 92-94)

Upon arrival at the border station the appellees were asked if they were subject to registration as narcotics violators, and they stated that they were not. At that time, they were placed in a room under armed guard and the camper was again searched and contraband found. After finding the contraband in the Selby camper Inspector Ramsey telephoned Nogales of his findings and was told to arrest all the defendants. Mr. Ramsey stated that he would have released the

occupants of the Clark Volkswagon after finding the contraband, but that the agent in Nogales told him to arrest everyone. (RT 116 L 12-20)

III

ARGUMENT

"Although the combination of facts necessary to constitute probable cause for making an arrest without a warrant is not a ststic concept, a continuing criterion is that arrests without a warrant will not be approved where an officer is stimulated by an inkling or suspicion only."

The vehicles were stopped by Deputy Sheriffs of Pima County, Arizona at the request of Customs Inspector Ramsey. (RT pg. 12-16) The reason the vehicles were stopped was because Inspector Ramsey was told that the occupants were subject to registration as narcotic violators pursuant to Title 18 U.S.C.A. 1407. (RT pg. 93 L 16-20)

During the time the vehicles were in transit back to the border station Inspector Ramsey decided he would conduct a search of the Chevrolet camper. (RT pg. 100 L 16-20)

Upon arrival at the border station the appellees were asked if they were subject to registration pursuant to Title 18 U.S.C.A. 1407 and they stated no. (RT pg. 100 L 16-20)

The appellees were then placed in a room at the border station under armed guard and a search without warrant or consent was made of the Selby camper. (RT pg. 33-35)

After finding contraband in the Selby vehicle Agent Ramsey again called Nogales and was told to arrest everyone in both vehicles otherwise he would have let the people in the Clark vehicle leave. (RT pg. 116 L 12-20)

The stopping of the vehicles constitutes an arrest. Henry v. U.S. (1959) 361 U.S. 98, 4 L. ED_2 134, 80 S. Ct. 168

The fourth amendment of the U.S. Constitution states; "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and

seizures, shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized".

In Giordanello v. U.S. 357 U.S. 480, 2 LED.1503, 78 S. Ct. 1245 it was held that the same standard applies to arrest warrants as to search warrants.

The only evidence Inspector Ramsey had that appellees were violating the law was that he was told four of the occupants of the two vehicles were possibly subject to registration under Title 18 U.S.C.A. 1407 and that Mr. Selby had gone north from the border station instead of returning south into Mexico. He (Ramsey) had no prior knowledge or information that anyone answering to those names or vehicles of that description were engaged in the importation of narcotics into the United States. (RT pg. 96 L 12-19)

The arrest of the appellees was illegal as it was made without probable cause.

"Neither search warrants nor arrest with or without warrant can be made without personal knowledge of officer applying for warrant or making the arrest of facts that would be competent in trial for the offense before the jury." Worthington v. U.S. (6th Cir. (1948), 166 F_2 557

"Existence of probable cause, warranting arrest of person believed to have committed felony must be determined by existence of facts known to officer before arrest. Mere suspicion is not enough to constitute grounds for arrest without warrant." Poldo v. U.S. (9th Cir. 1932), 55 F_2 866

"Common rumor or report, suspicion or even strong reason to suspect is not adequate to support a warrant of arrest." Henry v. U.S., supra

The evidence seized as a result of the search of the Selby vehicle should be suppressed since the search was incident to an unlawful arrest.

"On showing that arrest was merely a pretext for search, evidence thus obtained must be suppressed." Worthington v. U.S., supra

"In determining probable cause for justifying an arrest without a warrant the fact that contraband was afterwards discovered is not sufficient since an arrest is not justified by what the subsequent search discloses." Henry v. U.S., supra

Warrants are required for search by customs inspectors if they have cause to believe that contraband is within a building, store or dwelling house, Title 19 U.S.C.A. 1595

There is no provision of the law that excepts Customs officers from the requirements of the fourth amendment of the United States Constitution.

In the Bailey case (5th cir. 1967) $386F_2$ 1 cited by appellant in its brief, the officers had information regarding the vehicle defendant was in, the vehicle was seen to travel into an area used for the trafficking of narcotics, and when the vehicle pulled off the roadway on its own and when officers approached they saw the defendant throw away a package containing narcotics the court held this was sufficient to constitute probable cause.

In the instant case the court is faced with an entirely different situation. There was no informant nor information known by Mr. Ramsey or Mr. Marshall regarding narcotic activity, only a vague request to have the vehicles returned to the border so that the opportunity to register pursuant to Title 18 U.S.C.A. 1407 be given the occupants. Since the trial court rejected the theory of border search the burden is on the government to show probable cause for the arrest of the appellees. The trial court felt that this was not done and granted the appellees Motion for Return of property and to Suppress Evidence.

In U.S. V. Walker (7th Cir. 1957) $246F_2$ 519 the court

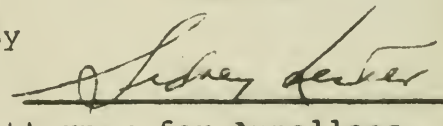
stated an inkling or suspicion alone will not justify an arrest without warrant.

IV

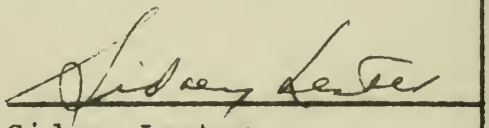
CONCLUSION

Appellees respectfully urge this court to find no probable cause existed for their arrest and that the Order granting their Motion for Return of Property and to Suppress Evidence should be affirmed.

Respectfully submitted
Sidney Lester
Santa Ana
George Chula
Santa Ana
William Berlat
Tuscon

By 
Attorney for Appellees

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.


Sidney Lester

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within action; by business address is:

522 South Broadway
Santa Ana, California

On July 15, 1968, I served the within Opening Brief of Appellee to be mailed to:

Edward E. Davis, Esq.
United States Attorney
P. O. Box 1951
Tuscon, Arizona 85702

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 15, 1968 at Santa Ana, California.

Vicki Cofer

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK KARL SELBY,
STEVEN ARTHUR CLARK,
PAUL EVANS CARBONE,
CAROL NALANI PALMIERI, and
ELAINE ROSE FODOR,
Appellees.

No. 22,719

On Appeal From An Order Of
The United States District Court
For the District of Arizona

REPLY BRIEF OF APPELLANT

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellant

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. FRANK KARL SELBY, STEVEN ARTHUR CLARK, PAUL EVANS CARBONE, CAROL NALANI PALMIERI, and ELAINE ROSE FODOR, *Appellees.*	No. 22,719

On Appeal From An Order Of
The United States District Court
For the District of Arizona

REPLY BRIEF OF APPELLANT

Appellees have filed a reply brief alleging there was no probable cause. Appellees also allege that the Customs Inspector Ramsey did not form the intent to search until the cars were on their way back to the Border (see page 5, lines 13-14, of Appellees' Brief).

What Ramsey stated was:

"Q. (By Lester) It is a fact, is it not, Mr. Ramsey, you intended to search that camper again, no matter what answer was given to you by Mr. Selby or any of the parties in that vehicle.

"A. I intended to look the camper over when it came back, yes." (RT 100 L 2-6)

Customs Agent Hugh Marshall had information on all five Appellees except Carol Palmieri (RT 140 L 7-9).

The District Court ruled that the stopping was not illegal, but that the return to the Border was (RT 158 L 15-24).

The Court went on to say that the return to the Border was not for the purpose of searching the car (RT 159 L 14-16), thus overlooking the testimony of Ramsey as quoted.

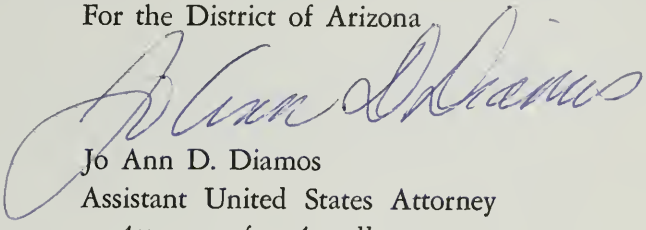
(The Government raised border search as well as probable cause in its Memorandum (RC Item 4) and at the hearing, but did not raise it in its Opening Brief. If the search was a border search, the test becomes reasonableness of the search, not probable cause for the search, *Denton v. United States,* 9th Cir. 1962, 310 F.2d 129, and in addition it must be established that the search was conducted before the contents could be changed after re-entry into the country. *King v. United States,* 9th Cir. 1965, 348 F.2d 814; *Leeks v. United States,* 9th Cir. 1966, 356 F.2d 470.)

It is respectfully submitted that the agents had probable cause to believe that the camper contained contraband and that the Volkswagen bus' occupants' and the camper's occupants' peculiar actions after crossing the border and their denial of the need to register constituted probable cause.

It is respectfully submitted the Order of the United States District Court granting the Motion to Suppress should be reversed.

Respectfully submitted,

EDWARD E. DAVIS
United States Attorney
For the District of Arizona



Jo Ann D. Diamos
Assistant United States Attorney
Attorneys for Appellant

Three copies of the Reply Brief of Appellant mailed this 24 day of July, 1968, to:

WILLIAM L. BERLAT
509 Arizona Land Title Building
Tucson, Arizona
Attorney for Appellees

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLORENTINO ENCINAS-SIERRAS, *Appellant,*	
vs.	No. 22,720
UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

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IN THE

United States Court of Appeals

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BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

This case was initiated by the return of an Indictment by the Federal Grand Jury sitting at Tucson, Arizona, on December 6, 1967. (Clerk's Record, page 4. Hereinafter, the Clerk's

Record will be referred to as "RC"; the Reporter's Transcript will be referred to as "RT"; the number following will refer to the page and the number following "L" will refer to the line. Appellant Florentino Encinas-Sierras will be referred to as Appellant or as Encinas-Sierras.)

The Indictment was in one count charging Appellant with having fraudulently and knowingly imported, and caused to be imported, and brought into the United States of America from the United States of Mexico at Nogales, Arizona, contrary to law, approximately 53.9 grams of heroin, a narcotic drug, on or about November 15, 1967, in violation of 21 U.S.C. §174 (RC 4). On December 11, 1967, Appellant appeared in person and by his retained counsel, H. Earl Rogge Jr., and pled not guilty (RC 18). On December 21, 1967, Appellant filed a motion for reduction of bond and the motion was heard and denied (RC 5).

Trial was held on January 26, 1968, before Judge James A. Walsh and the jury returned a verdict of guilty (RC 8). On January 31, 1968, Appellant filed a motion for new trial (RC 9). On February 1, 1968, the Government filed a memorandum in opposition to the motion for new trial (RC 11). On February 1, 1968, the Court heard argument on the motion for new trial and denied it (RC 19), and sentenced Appellant to ten years (RC 12). On February 8, 1968, the Court denied a motion for reduction of sentence (RC 19). On February 9, 1968, Notice of Appeal was filed (RC 13). On February 21, 1968, the Court entered an Order granting leave to appeal in forma pauperis and also appointing his trial counsel as counsel for the appeal (RC 15, 16). Appellant is in custody.

The Trial Court had jurisdiction of the Appeal by the provisions of 18 U.S.C. §3231. This Court has jurisdiction of the Appeal by the provisions of 28 U.S.C. §1291.

II.

STATEMENT OF FACTS

At about noon on November 15, 1967, Customs Port Investigator Everett H. Turner arrived at the Morley Avenue Gate, the smaller of the two gates at the port-of-entry, at Nogales, Arizona, from Mexico into the United States (RT 21, L 10 to 23, L 21). Customs Inspector William Fellars saw the Appellant in a 1958 International pickup truck coming from Mexico and entering the United States at the Morley Avenue Gate (RT 49, L 10-16). Turner saw the Appellant in the said 1958 International pickup truck at about 2:00 p.m. just pulling away from the Inspector's area (RT 24, L 1-15). Turner jumped onto the truck and the Appellant grabbed the door handle on the driver's side (RT 24, L 18-20). Turner grabbed the Appellant's arm and turned the motor off (RT 24, L 25). Turner took the Appellant into the building with Customs Inspector Williams Fellars (RT 25, L 4-7; 49, L 20). Turner went out to move the pickup and search it (RT 25, L 18-20). Fellars frisked the Appellant and then had him empty his pockets (RT 49, L 24-25). Turner returned and asked the Appellant if he was bringing anything from Mexico and the Appellant said no; Turner then told him he was going to search his person (RT 26, L 12-18). Then, with Fellars, Turner had the Appellant step into the search room (RT 50, L 2-3; 26, L 20-24). Turner asked him to drop his pants and as the Appellant did this, Turner smelled a distinct odor which he recognized (RT 26, L 25 to 27, L 2). Turner then asked him to drop his undershorts, and the Appellant snapped the elastic; Turner repeated the request and again the Appellant snapped his shorts (RT 27, L 9-11). Turner again asked and then the Appellant dropped his undershorts (RT 27, L 12). Turner saw a piece of white paper sticking out of his shorts,

which paper contained two rubber contraceptives (RT 28, L 1-10). These became Government's Exhibit 2 in evidence. (The chain of custody will not be set out since it is not in issue.) One of the two rubber contraceptives contained 55.3 grams or 1.95 ounces of 46.8% pure heroin (RT 78, L 16 to 79, L 24).

The Appellant testified in his own behalf (RT 81-94). He stated that he had earned the $240 cash he had on him when arrested, working as a bartender for the Frontera Bar in Nogales, Sonora, Mexico, where he had a Pete Martinez as a customer (RT 81-84). He testified this Martinez attempted to become friendly with him in the three months Martinez was a customer (RT 84, L 9-20). On the day the Appellant was arrested, November 15, 1967, he said he met Martinez with a man called Johnny on the corner of Obregon Avenue and Campillo Street in Nogales, Sonora, Mexico (RT 86, L 5-16). Martinez asked him to carry a package across for him into the United States for $5.00 and lent the Appellant his pickup truck (RT 87, L 18-88, L 5). Martinez told him to carry it inside his shorts (RT 88, L 9-12). He denied knowing what was in the package (RT 88, L 24-25). Appellant testified he met Martinez and received the package ten minutes before he was arrested (RT 94, L 4).

III.
OPPOSITION TO SPECIFICATION OF ERRORS

1. The Court did not err in refusing to allow Appellant's Counsel to learn the identity of the informer.

2. The Court did permit the Government witness to state whether or not the informant was a Johnny Grant.

3. The Court did not err in refusing to instruct on entrapment.

IV.
SUMMARY OF ARGUMENT

1. The Court properly sustained the Government's claim of privilege against revealing the name of the informant.

2. There were no grounds upon which the Court could have instructed entrapment.

V.
ARGUMENT

1. The Court properly sustained the Government's claim of privilege against revealing the name of the informant.

In *Roviaro v. United States* (1957) 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639, the Supreme Court held at pages 60-61:

> "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

However, the Court went on to hold in *Roviaro v. United States, supra,* at page 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the

possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In *McCray v. Illinois* (1967) 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed. 2d 62, the Supreme Court sustained the claim of privilege.

In the instant case the Appellant's counsel asked the witness Everett Turner did he know a Negro man, 5'10" to 5'11" tall, approximately 28 years old, whose first name is Johnny and he replied he did know a man by the name of Johnny Grant who fitted that description (RT 43, L 11-19).

Out of the prescence of the jury, Appellant's counsel avowed that the Appellant would testify:

> "MR. ROGGE: That Johnny was present when the conversation occurred between Martinez and he, where he was asked to take this package across the border and deliver it to a store. He was paid $5 for it. That he was not told what was in it." (RT 44, L 10-14)

The Government's counsel avowed to the Court that the informer was not Johnny Grant, nor Pedro, or Pete Martinez (RT 45, L 3-10).

At the noon recess, out of the hearing of the jury, Turner was recalled and the following testimony taken:

"BY THE COURT:

"Q Mr. Turner, was the informant in this case Pete Martinez?

"A No, sir.

"Q Was he John Grant or Juan Grant?

"A No, sir.

"Q Was he a Negro male with the first name of Johnny?

"A No, sir." (RT 62, L 14-21)

Appellant's counsel then went on to ask if the informant

had an alias, to which Turner replied not to his knowledge (RT 63, L 18-23). When asked if he knew a Pete or Pedro Martinez, Turner stated he did not (RT 64, L 4).

Turner did testify on cross-examination that the pickup truck was registered to a J. Sanchez (RT 42, L 18 to 43, L 3). On re-direct Turner testified he knows J. Sanchez as the common-law wife of Hector Ambriz (RT 46, L 20-25) and that he saw Hector Ambriz on the Mexican side of the line just prior to the Appellant entering the port in the pickup (RT 46, L 12-19).

As the Court stated:

> "THE COURT: There is a balance of interest here and on the statement of counsel as to the defendant's testimony, there is no basis shown for the setting aside of the informant's privilege. The privilege can be destroyed by going into every detail of it so that finally the person can be identified although not named." (RT 66, L 14-19)

Appellant would have you believe that the Government's Informant duped the Appellant into carrying the heroin. To accept this as a possibility, then it must be accepted that the informer would have used 1.95 ounces (RT 78, L 22) of 46.8% pure heroin (RT 79, L 21) and had enclosed 1.5 ounces of novocaine, an adulterate for heroin, as well as the 1958 truck which was seized, in return for a fee of $200 (RT 65, L 11).

Furthermore, Appellant testified it was a chance meeting on the street when he had come up from Hermosillo to go into the United States to buy clothes, and that this meeting occurred just ten minutes prior to his crossing. This, it is respectfully submitted, is beyond the realm of probability or possibility.

The jury, during its deliberations returned to open Court and the following proceedings in the presence of Appellant and counsel were had:

"THE COURT: I have another note, I assume from the foreman, reading: 'In the Judge's instructions, we would like to know the meaning of the words "and knowingly import," "approximately 53.9 grams of heroin." That is, did the defendant have to know it was heroin?'

"In this regard, members of the jury, before you could convict the defendant of the charge made against him, you would have to find from the evidence beyond a reasonable doubt that he knew that he possessed the substance that he was charged with possessing and further that he knew it was heroin. That is the answer to that question." (RT 120, L 17 to 121, L 2)

The jury was thereby *re-instructed* that a defendant must knowingly possess the heroin and know it is heroin.

It is respectfully submitted the Government's claim of privilege was properly sustained. *Ruiz v. United States* (9th Cir., 1967) 380 F.2d 17; *Rodriguez-Gonzales v. United States* (9th Cir., 1967) 378 F.2d 256 (Compare *Velarde-Villarreal v. United States* (9th Cir. 1965) 354 F.2d 9).

2. There were no grounds upon which the Court could have instructed entrapment.

Appellant claims there were grounds for the Court to have instructed on entrapment, citing *William Nordeste v. United States* (9th Cir., April 4, 1968) No. 21, 294, ... F.2d ....., at page 5 of the slip sheet opinion. The full paragraph reads as follows:

"It is true, as Nordeste argues, that in considering the defense of entrapment, conduct of government agents prior to the transactions in question must also be taken into account. See *Sherman v. United States,* 356 U.S. 369, 374. But there is here no evidence of prior conduct on the part of White which could have led the jury to find that he had induced Nordeste to sell narcotics to McDonnell or any other government agent.[5]"

In that case, as here, there was no evidence of prior conduct of any Government agent to induce Appellant to carry the contraband.

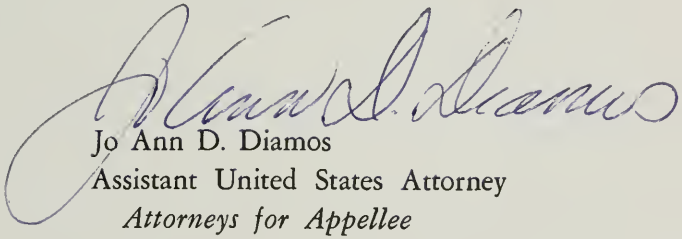
It is respectfully submitted there were no grounds for the giving of an entrapment instruction.

VI.
CONCLUSION

The Government's claim of privilege was properly sustained and there were no grounds for entrapment instruction.

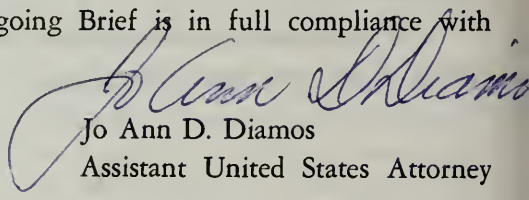
Respectfully submitted,

EDWARD E. DAVIS
United States Attorney
For the District of Arizona



Jo Ann D. Diamos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Diamos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this 27th day of May, 1968, to:

H. Earl Rogge, Jr.
610 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NSTON BRYANT McCONNEY,

Appellant,

v.

TED STATES OF AMERICA,

Appellee.

NO. 22722

BRIEF OF THE APPELLEE

CECIL F. POOLE
United States Attorney

DAVID P. BANCROFT
Assistant United States Attorney

JERROLD M. LADAR
Assistant United States Attorney
Chief, Criminal Division

Attorneys for Appellee

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BRIEF OF THE APPELLEE

I

ISSUES PRESENTED FOR REVIEW

Appellant presents four issues for review. They may properly be stated as follows:

1. Did the District Court commit reversible error by abusing its discretion in denying appellant's motion for another continuance, made on the morning of trial and based upon the previously known absence of an informant, in light of the Government's compliance with the appellant's request for his presence and with the terms of the Court's orders with respect to same and the Court's admitting into evidence the hearsay statement of the allegedly desired witness which

consisted of the testimony appellant hoped to have him give?

2. Did the District Court commit reversible error by the questions it asked the witnesses?

3. Did the District Court commit error in admitting into evidence a statement made by appellant's co-defendant in the course of committing the crime charged and/or testimony of a statement made by the informant offered and admitted solely to impeach his hearsay statement offered by appellant and admitted into evidence?

4. Does Title 26, United States Code, Section 4705(a) violate the Fifth Amendment privilege against self-incrimination?

II

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition:

On November 16, 1966, appellant and Paul McAlee were jointly indicted for violation of 26 U.S.C. 4705(a) (unlawful sale of heroin). Appellant became a fugitive[1/] (R.T. 190:15-16; 5:18-20) and accordingly, McAlee was tried separately by a jury and convicted on January 13, 1967. Appellant's first jury trial commenced on July 24, 1967. A mistrial was declared the following day due to a juror's disability. The next day the case was set for trial October 9, 1967. On that date the trial was continued to October 16, 1967, and on that date continued again for trial to October 23, 1967, when the second jury trial commenced and the defendant was found guilty the following day. On November 14, 1967, he was sentenced to the minimum term for his violation of said statute.[2/] He has been at liberty on bond pending this appeal.

1/ Reporter's Transcript (R.T.) 190:15-16; 5:18-20.

2/ 26 U.S.C. 7237(a) provides for a minimum mandatory term of five years in prison. Appellant was also fined $1.00.

Statement of Facts:[3/]

On October 14, 1967, in Berkeley, California, a Federal Bureau of Narcotics Agent, Stephen Chesley, acting undercover, went to the apartment of Mr. Jesse Coy, a Government informant, where he met and conferred with Mr. Coy in the living room (R.T. 37:10 - 41:11). The appellant and Paul McAlee were already in the bathroom. McAlee exited the bathroom, entered a hallway leading to the living room, appeared there, stated to the Agent and Mr. Coy, "We are ready, get the money." and returned to the bathroom (R.T. 41:15 - 42:21; 44:2-9; 66:1-11). The Agent then transferred $450.00 of official funds to Mr. Coy and they both proceeded to the bathroom (R.T. 44:12-24) about twenty-five feet away (R.T. 45:13-21; 46:22 to 47:3) where Chesley found the bathroom door open (R.T. 45:22-24). He stood on the threshold of the bathroom directly behind Mr. Coy and observed appellant standing by the toilet and McAlee seated to the right on the bathtub (R.T. 51:15 - 53:8). Appellant said, "There it is." (R.T. 53:9-13) On a chair in the bathroom facing the

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3/ The facts on appeal are viewed in the light most favorable to the Government. Miller and Joseph v. United States, 382 F.2d 583 (9th Cir. 1967).

appellant, its back to McAlee, was a quantity of a white powdery substance resting on a paper tablet (R.T. 53:22 - 54:10). Mr. Coy started to hand the money to McAlee but appellant snatched it out of both of their hands and proceeded to count it (R.T. 55:5-25). Mr. Coy then retrieved the powder and turned around giving it to the Agent (R.T. 56:20-21). Appellant, followed by McAlee, then exited the bathroom, appellant stating that he would meet the Agent later (R.T. 57:2-20). The white powder was subsequently chemically analyzed and found to be heroin (R.T. 17:22 - 31:12; 62:12-23). No official order form was transferred or displayed by or to any of the parties to this transaction (R.T. 62:4-11).

At McAlee's trial in mid-January, 1967, the Government had Mr. Coy present for call as a witness and he testified (R.T. 158:19 to 159:7; 170:12 to 172:11).

In early March, 1967, approximately two weeks after he plead not guilty, the appellant, in company of some of his friends, met Mr. Coy on a street corner in Berkeley and told Coy that he wanted him to go to the appellant's lawyer's office and give a statement that Agent Chesley was not in the bathroom and did not

see the alleged transaction (R.T. 201:5-14). Mr. Coy went to the office, and, with appellant waiting outside in the reception room (R.T. 124:8-11; 198:17-25), was tape-recorded by appellant's attorneys (R.T. 111:18 to 112:20). They elicited from him the statement appellant McConney had asked for (R.T. 117:14 - 118:15). They did not ask what Mr. Coy himself had observed in the bathroom (R.T. 132:5-17; 159:8 to 169:3).

On April 25, 1967, trial date was set for July 25,1967. Four days prior to trial appellant's attorney attempted to have their private investigator serve a subpoena on Mr. Coy who refused service (Op. Br. App. A-2, ll. 5-6). The Assistant United States Attorney assigned to try the case was contacted by appellant's trial counsel and, by mutual agreement, first attempted to serve Mr. Coy with a subpoena, which he refused (Op. Br. App. A-2, ll. 19-24, 28-29), and then had Mr. Coy arrested by federal agents as a material witness on a warrant authorized by the Government and filed the next day (Op. Br. App. B-1 and B-2). At the July 24, 1967 trial, Mr. Coy appeared at liberty on bail and available for testimony as a defense witness (Op. Br. p. 2, l. 20 to p. 4, l. 5). When a mistrial,

due to a juror's disqualification (Op. Br. App. C, par. 2), was declared, the trial judge ordered that Mr. Coy remain at liberty on the bail previously set, directed him to appear at 8:00 A.M. at the Berkeley Police Department on the morning of the next trial date, which was to be set, pursuant to notification to him by the Government of the new trial date. No objection to this procedure was made by appellant's counsel (Ibid).

The next day, trial was set for October 9, 1967. On October 2, 1967, Mr. Coy telephoned and was advised of the October 9 trial date and stated that he would present himself as directed. He failed to appear on that date (R.T. 4:5-7) and a warrant for his arrest was issued (Op. Br. App. A-3, ll. 7-8). Accordingly, the case was continued to October 16, 1967 and then on that date, again to October 23, 1967.

On October 23, 1967, the morning of trial, while the jury panel was waiting, appellant's trial counsel requested another continuance on the ground that Mr. Coy still could not be found (R.T. 2:14-16). Appellant's trial counsel stated that it took over a month to find Mr. Coy for the last trial and did not allege any factual basis for leads as to finding Mr. Coy

except that "he continually returns to Berkeley and can be found there when he is there" (R.T. 3:6-8). The Government, through the Berkeley Police Department, had been trying to locate the witness but had developed no leads to indicate where he was (R.T. 4:4-9).

The Court found that there was no reasonable prospect that a third continuance would assure the location of Mr. Coy, that it had been almost a year since indictment and ten months since arraignment and accordingly denied the request for another continuance (R.T. 5:18-24; 6:25 to 7:5). However, in denying the motion for another continuance, the Court ruled that, in the absence of Mr. Coy, it would allow the appellant's trial counsel to introduce as affirmative evidence in his case the out-of-court tape-recorded statement they elicited from Mr. Coy (R.T. 6:9-24). The Government stated that it had no objection to this statement being so introduced into evidence by the defendant (R.T. 4:9-17). The defendant's theory supporting its admissibility was that it was a statement made against "penal interest" (possible perjury) (R.T. 100:9-10). The trial court, "in the interest of justice" (R.T. 99:18) and "to resolve the doubt in favor of the accused" (R.T. 101:1-2), admitted into evidence the

portion of the statement offered by the defendant into evidence (R.T. 102:4 to 103:12), although appellant's trial counsel had not had a transcript of the sworn testimony, with which the tape-recorded statement allegedly conflicted prepared, until almost a month after he had elicited the statement from him (R.T. 100:16-17) and accordingly was never shown to Mr. Coy prior to or at the time of his March 2, 1967 statement nor was his attention ever directed to his previous sworn testimony (R.T. 131:8-23; 132:18-24). Ultimately, the Government suggested and moved for admission into evidence of the entire statement, which was done (R.T. 133:21).

III

ARGUMENT

I

We have undertaken a detailed statement of the facts solely with respect to appellant's first specification of error since we believe that appellant's statement does not accurately state those facts. We submit that the trial court did not abuse its discretion in denying appellant's request for a further continuance in view of the following facts: the very limited nature and scope of the testimony the appellant was hopeful of eliciting from Mr. Coy; there was another readily

available witness who the defense made no effort whatsoever to call; counsel's motion for yet another continuance was not made in a context of his being surprised by Mr. Coy's non-appearance; there was no reasonable prospect of securing his attendance in the proximate future; the Government was not at fault for his non-appearance and had made a reasonable effort to locate him. Further, it is submitted that the trial judge's liberal ruling admitting the absent out-of-court statement into evidence amply protected defendant's rights.

1. At the outset, it must be observed that the scope of the testimony which appellant's trial counsel was hopeful of eliciting from Mr. Coy was virtually myopic: that Agent Chesley did not assume a vantage point from which he could see what appellant did in the bathroom with the heroin. It pointedly avoided any reference to the operative facts of the alleged transaction, i.e., what Mr. Coy may have himself seen and heard appellant do there where the illicit sale took place. The proposed testimony of the absent witness did not bear in any sense upon entrapment, no claim of entrapment was ever made by the appellant nor do any facts appear in the record suggesting same. Moreover,

on the narrow issue of the agent's vantage point, defense counsel never made any motion for the production of a second witness to the transaction other than Mr. Coy, who was readily available and who had observed all that took place: Paul McAlee, the already convicted co-defendant. The Government had issued a writ of habeas corpus ad testificandum for McAlee for the July 25, 1967 trial. No motion was ever made by defense counsel for his production on this or any other such writ.

2. It is apparent from defendant's trial counsel's affidavit (Op. Br. App. A-3), prepared four days prior to trial to support his motion for another continuance, that he knew that Mr. Coy had failed to appear for trial on October 9, 1967, two weeks previously (Ibid, 6-7), and accordingly could not have been genuinely surprised by his non-appearance on the morning of October 23, 1967, when, with the jury panel waiting, he made his motion for a further continuance.

3. Appellant states that his trial counsel represented that Mr. Coy could be found within thirty days (Op. Br. ix:14). To the contrary, no time was avered and no factual basis was alleged by his counsel to indicate that there was even such a probability.

Trial counsel simply admitted that "it took over a month to find him last time" (for the July 25, 1967 jury trial) (R.T. 3:1-3).

4. Appellant asserts that the failure of appearance of the witness was the fault of the prosecution (Op. Br. 5:12-13), attributable to its negligence (Op. Br. 7:17-18) and that the Government hindered the defendant's efforts to locate him (Op. Br. 7:25).

It is "abundantly clear that the Government is not the guarantor of a special employee's appearance at trial." United States v. White, 324 F.2d 814 (2nd Cir. 1963). Additionally, this record establishes that the Government amply met its burden of a "good faith reasonable effort" (Tapia-Corona v. United States, 369 F.2d 366 (9th Cir. 1966)) to have the witness present. The record demonstrates that the Government never attempted to conceal the witness, and amply complied with both the appellant's requests for him and the Court's orders for his attendance.

At defendant McAlee's trial, the Government produced Mr. Coy for call as a witness and he testified fully as to the details of the heroin sale.

In late July, 1967, preparatory to appellant's

first trial when the appellant was unable to serve him with a subpoena, the Government complied with appellant's request to serve its own subpoena, and when that failed, in circumstances which indicated that the witness was being recalcitrant to both parties, the Government again, by agreement with appellant's counsel, authorized and filed a material witness warrant against him, had him arrested and had him present in Court on July 25, 1967 for testimony. When this trial was aborted by a mistrial for a reason wholly independent of Mr. Coy, the Court ordered Mr. Coy to continue on his bail and, for his convenience, to report for the next trial to the Berkeley Police Department. To this, defendant's counsel made no objection. When Mr. Coy contacted the Government on October 2, 1967, they advised him of the October 9, 1967 trial date and he stated he would be there. When he failed to appear, a new warrant was authorized. Between October 9 and October 23, 1967, the Berkeley Police Department, being the agency to which the Court had directed the witness to report, the general police agency of defendant's residence[4/], the agency which had participated in

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4/ Coy resided in Berkeley at the time of the offense. (R.T. 161:2-4) On March 1 and 2, 1967, he was found there by appellant. According to appellant's trial counsel as of July 20, 1967, Mr. Coy was staying in an apartment in Berkeley (Op. Br. App. A-2, l. 5) and as of October 23, 1967, "he continually returns to Berkeley and he can be

successfully effecting his arrest on the July, 1967 material witness warrant, an agency which knew of his activities as an informant[5/], in cooperation with federal authorities, had searched for him and was unable to locate him or develop any leads as to his whereabouts.

The cases cited by appellant are inapposite on their facts. They involve denials of motions for continuance where the witnesses' whereabouts were known, Scott v. United States, 263 F.2d 398, 401 (5th Cir. 1959); Younge v. United States, 223 F. 941 (4th Cir. 1915), cert. den. 245 U.S. 656 (1917), and/or where the defendant was given only one day's notice to prepare for trial and subpoena his witnesses, Paoni v. United States, 281 F. 801 (3rd Cir. 1922), or requested a continuance of only several hours for same, United States v. Pate, 345 F.2d 691, 694 (2nd Cir. 1965).

The facts of the instant case stand in stark contrast to those of Velarde-Villarreal v. United States,

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5/ According to appellant's own trial counsel, Officer Barons of the Berkeley Police Department apparently was fully acquainted with Mr. Coy's actions as an informant (R.T. 178:5-17; 179:15-21).

354 F.2d 9 (9th Cir. 1965), not cited by appellant. There, the appellant made out a strong claim of having been entraped by the missing informant, the record showed that the Government never even attempted to advise the informant of the trial although it was in periodic contact with him after the offense and the record indicated that the Government may have purposely made the informant unavailable for trial by sending him out of the country.

5. The appellant attempts to emasculate the force and effect of the Court's admitting into evidence Mr. Coy's out-of-court statement, which comprised the precise testimony the defendant desired and expected from the witness, by stating in his Brief that the Court limited its evidentiary application to simply impeachment of Mr. Coy's testimony given in the earlier trial of co-defendant McAlee (Op. Br. x:1-6). This is not true. The Government agreed that the portion of the statement desired by defendant's counsel could be introduced by the defendant as affirmative evidence in his case to impeach Agent Chesley, that is, have the same force and effect as if Mr. Coy was present at trial and testified in exact accordance with the statement. When the defendant later offered the entire statement into evidence, the Government agreed

to admit the balance of the statement as its own evidence, which was done.

The defendant's theory of admissibility was that the statement might fall within the "statement against penal interest" exception to the hearsay rule. It is noteworthy that no known federal case has ever permitted such an exception. The Supreme Court in Donelly v. United States, 228 U.S. 243, 272-277 (1912), and this Court in Jeffries v. United States, 215 F.2d 225, 226 (9th Cir. 1954), have held such statements inadmissible in evidence. The weight of authority is against their admissibility. Jones v. United States, 400 F.2d 134, 136 (9th Cir. 1968). Even if analogized to statements against proprietary or pecuniary interest, the circumstances under which the statement was procured by appellant, as well as the fact that it was not self-evident or apparent that the witness was aware that it was against his penal interest (alleged perjury) since no reference was made to his prior testimony when he gave the taped statement, these circumstances would have fully justified its exclusion as not having been made in trustworthy circumstances. (See, 5 Wigmore § 1457, p. 263, 1964 Supp., pp. 64-65.)

Finally, appellant asserts that the absence of

Mr. Coy precluded, since the necessary foundation could not therefore be laid, proof that Mr. Coy was independently dealing, without the knowledge of law enforcement, in non-narcotic drugs. It is submitted that this evidence would have been inadmissible, as irrelevent, immaterial and improper impeachment even if Mr. Coy had personally testified at the trial. The purpose of this proof, according to appellant's trial counsel, was to show "inferentially" that Mr. Coy participated in the instant sale of heroin as an informant so that the attention of law enforcement would be diverted from him as a dealer (R.T. 176:21 to 177:16), yet defense counsel made no claim of entrapment and the defendant's testimony belies any such claim and further disavowed any claim that the heroin was supplied by Mr. Coy (R.T. 176:21-22) and thus that he committed the crime. Accordingly, the evidence was irrelevant and immaterial. Alternatively, it was offered as impeachment of Mr. Coy's statements in evidence (R.T. 180:2-9). But the offer of proof consisted solely of alleged acts of misconduct not resulting in conviction which are not the subject of impeachment.

In any event, the purported proof was directed to wholly collateral and tangential issues, and its probative value rested upon a series of inferences so attentuated that the Court was fully justified in excluding it.

The discretion of a trial court in denying motions for continuances will not be reviewed on appeal absent clear abuse of that discretion. Lemons v. United States, 337 F.2d 619, 620 (9th Cir. 1967). It is submitted that the trial court's ruling here, denying a motion, made on the morning of trial, in a case which was approaching its anniversary, with no reasonable prospect of securing the attendance of the witness in the proximate future, when his expected testimony only concerned the vantage point of one of the Government's witnesses, in a context which belies any negligence or collusion by the Government with respect to the absence of the witness, when there was another witness available to the defendant who observed the pertinent matters and the defendant made no effort whatsoever to call him, and where the Court permitted the introduction into evidence of the witness' out-of-court statement which comprised the precise testimony the defendant wished to produce from the witness if present, was entirely proper and the appellant was not prejudiced thereby.

II

Appellant asserts as error the trial judge's asking questions of the witnesses and, more particularly, alleges that the Court "took over" the cross-examination of appellant (Op. Br. xii:10-11) and demonstrated a clear partiality to the prosecution (Ibid, 11-12).

The record discloses that the overwhelming majority of the Court's questions were directed solely to foundational and preliminary matters. The record also discloses that, contrary to the appellant's statement (Op. Br. 12:17-18), no objection was ever made by appellant's trial counsel to any of the questions. The Court's overall conduct of the trial and the vigorous assertion by appellant's trial counsel of his various motions to the Court belies any contention that counsel was intimidated from making any objection to the Court's questions. The record does not support appellant's contention that the Court showed any partiality to the prosecution. For example, the Court questioned the Government percipient witness, Agent Chesley, as follows concerning payments to Mr. Coy:

"THE COURT: Your answer is you don't know or that he was not paid?

"THE WITNESS: He was not paid.

"MR. WELLS: Q. He was paid on what basis, then?

"A. On the basis of expenses incurred.

"Q. You took his word for the expenses, is that it?

"A. He had a telephone bill.

"THE COURT: Did you additionally pay him any daily pay? Did he ever get $5.00 or $10.00 a day or was he paid for his time?

"THE WITNESS: No, sir.

"THE COURT: So you say the only pay he received was for expenses incurred by him?

"THE WITNESS: Expenses incurred and there would probably be a little bit more, but as far as actual pay, by paying him $5.00 or $10.00 a day, no, it was just --

"THE COURT: Then will you explain to us what you mean by getting a little more?

"THE WITNESS: Well, if his expenses came to, say, $5.00 for telephone calls he would probably get $10.00.

"THE COURT: All right. In other words, you sweetened his expenses.

"THE WITNESS: I would say yes, sir." (R.T. 75:23 to 76:20) (Emphasis added.)

In addition to the instruction quoted by the appellant (Op. Br. 19:8-14) (the record fails to disclose that the Judge ever made any comments on the evidence), the Court's instructions were virtually riddled with admonitions and directives to the jury

that the facts, the evidence, its weight and the witnesses' credibility were solely for them to determine:

1. "You are the sole judges of the facts." (R.T. 214:12-13)

2. "I must not and do not trespass upon your duty, the duty of determining the facts and the credibility of the witnesses." (R.T. 214:16-18).

3. "You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves." (R.T. 223:1-2)

4. "The jurors are the sole judges of the credibility of all the witnesses and the weight and effect of all the evidence." (R.T. 231:23-25).

Just as none of the questions by the Court were never objected to by the defense, neither were any of the instructions applicable thereto.

It is submitted that the record wholly fails to disclose that the Court's questioning of any witness, in light of the nature of questions asked, their equal application to Government and defendant, the brevity of the Court's questions addressed to the defendant

which went solely to developing details of two matters already elicited through trial counsel's questioning and the instructions in the case as taken as a whole, that the jury could have reasonably been influenced thereby in the rendering of their verdict.

III

Appellant next asserts as error the admission into evidence of co-defendant McAlee's statement made from the hallway which ran from the bathroom, where the appellant was, to the living room, where the Agent and Mr. Coy were.

The statment was, "We are ready, get the money." (R.T. 66:1-11) This statement, even if it could conceivably be held to be inadmissible hearsay, was hardly damaging to appellant's case. His own testimony was that he was present at the sale, that he was there merely to collect a debt owed to him by McAlee and, in effect, that McAlee had told him to come to the apartment to collect the money since McAlee had a deal going (R.T. 181:19 to 185:1). Accordingly, McAlee's above quoted statement did not seriously impugn the appellant's claimed defense.

But it is submitted that a detailed and ample foundation was laid to support its admissibility as both an adoptive admission and as a statement of an agent.

As an adoptive admission, an ample foundation was made in the record to show that the statement was made in the presence of the appellant. When Agent Chesley initially entered the apartment, the bathroom door, which was immediately to the left of the entrance (R.T. 70:5-8), was closed (Ibid, 20-24). Chesley, seated in the living room, heard from the direction of the bathroom, about twenty feet away, a door open, did not hear it close again, whereupon McAlee immediately appeared in the hallway entrance to the living room (R.T. 72:5-8; 41:15 - 42:20) and stated, "We are ready, get the money.", thereupon returning in the direction of the bathroom. When Chesley proceeded to the bathroom, the bathroom door was open (R.T. 45:22-24), the appellant and McAlee inside (R.T. 46:3-6). Accordingly, a sufficient foundation was laid to support the admissibility of the statement as having been made in the presence of appellant McConney.

Again the statement was admissible as one by an agent, i.e., by McAlee as an agent of the appellant. Here again an ample foundation was laid. Each fact set forth in our statement of facts was proved prior to the statement being offered before the jury. In addition, it was shown that after the appellant said, in the bathroom, "There it is.", the heroin being then on the

seat of a chair which was facing him, Mr. Coy said, "Where?", and McAlee responded, "Right there.", motioning to the chair (R.T. 53:16-22), whereupon he vouched for its quality (R.T. 54:11-17). The Court made a specific finding that there was a sufficient showing of concert of act to justify the admissibility of the statement against the appellant (R.T. 60:12-16). It is submitted that this finding comported precisely with the applicable standard for the admissibility of such statements:

> The test is not whether the defendant's connection had by independent evidence been proved beyond a reasonable doubt but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facia case (one which would support a finding) has been made. Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), cert. den. 365 U.S. 861, reh. den. 376 U.S. 901.

Appellant next asserts as error the admission into evidence of Agent Chesley's testimony that Mr. Coy told him on July 25, 1967, that Coy had lied in his statement to appellant's attorneys. We submit that its admission into evidence was proper.

Once a declarant's out-of-court statement has been admitted into evidence for the truth of the matters asserted therein under an exception to the hearsay rule, that hearsay statement may be impeached by a subsequent hearsay statement by the declarant inconsistent with it.

Before the turn of the century, there was the rule announced for the federal courts. Carver v. United States, 164 U.S. 694, 697-698 (1897) [dying declaration offered by one party and admitted into evidence held: reversible error to exclude from evidence inconsistent hearsay statements by declarant offered to impeach his hearsay statement.] It has been the law in California for over twenty years. People v. Collup, 27 Cal.2d 829, 836-837, 167 P.2d 714 (Cal. Supp. Ct. 1946) [former statement of absent witness offered by one party and admitted into evidence, held: reversible error to exclude other hearsay statement made subsequently and offered for impeachment]; Am.Cal. Investment Co. v. Sharlyn Estates, Inc., 255 Cal.2d 526, 542, 63 Cal. Rptr. 518 (1967) [same]. The rule is supported by overwhelming authority. 3 Wigmore, Section 1033, p. 716, ftn. 1; p. 718, ftn. 3 (see cases cited). Wigmore himself endorses the rule (Ibid, accompanying text). The rationale and policy underpinnings of the rule as ellucidated by the aforementioned authorities, are sound: Where the hearsay statement initially admitted into evidence was made in circumstances which did not permit cross-examination by the opponent, and is offered for the truth of the matters asserted

therein, the usual foundation requirement that the declarant be available to explain the inconsistency is dispensed with, as otherwise the hearsay statement would be virtually immunized from attack, as no other such evidence is, by precluding the introduction into evidence of the most probative evidence impeaching it: that at some other time the declarant made another statement inconsistent with it and/or admitting its falsehood.

As the trial judge instructed the jury, the sole purpose for which the second statement in the instant case was admitted was for impeachment, and he instructed them that was the sole purpose for which they could consider it (R.T. 208:4-11, 24-25). The trial court's instructions to the jury to disregard the stricken testimony concerning circumstances surrounding the impeachment were ample and clear (R.T. 211:13-23; 218:22-23).

Appellant cannot now be heard to complain of the repeated instructions since he himself asked for them (R.T. 211:13-24).

IV

26 U.S.C. 4705(a) is not unconstitutional as violating a Fifth Amendment privilege against self-incrimination.

We quote from our Supplemental Memorandum filed before this Court in Clinton Johnson v. United States, No. 22,258 (under submission).

> The statute in question makes no informational demands upon the appellant or others similarly situated, and it is clear that the present prosecution is not related to any failure to provide information. The registration and taxation provisions of the Act exempt anyone who cannot demonstrate that his activities are in full compliance with local and Federal law, and accordingly the required information cannot be classified as creating real and appreciable hazards of criminal prosecution.
>
> An illegal transfer of narcotic drugs in violation of 26 USC §4705(a) is not based upon the appellant's failure to fulfill a statutory requirement to provide information.[1]
>
> The proscribed act is the transfer of narcotic drugs to a person who has not demonstrated his lawful right to possession by providing a written order form to the seller. It is the purchaser and not the seller who is required to provide information to secure the order form.[2] Since 26 USC §4705(a) imposes no informational requirement upon a transferor in the appellant's position, there can be no possibility of self-incrimination.

1/ It is the recipient of the narcotic drugs who is required to register and pay the special tax. 26 USC §4705(a) and 4705(f).

2/ Contrast the provisions of 26 USC 4744(a) which provide for the criminal prosecution of the recipient of marihuana. United States v. Covington, 282 F.Supp. 886 (SD Ohio).

In contrast to the statutes considered in Marchetti, Grosso, and Haynes, supra, 26 USC §4705(a) is administered so as to require registration and payment of the tax only by persons who may do so without violating local or Federal laws.3/

The applicable regulations require any person attempting to register to demonstrate that he is lawfully qualified to deal in narcotic drugs.4/ This limitation upon the registration and taxing provisions of Sections 4721 and 4722 of Title 26, United States Code, has been approved and indeed commanded by previous judicial construction of these Sections. United States v. Jin Fuey Moy, 241 US 394, 402 (1916); Martin v. United States, 20 F.2d 785 (6th Cir. 1927).

The appellant as a transferor of narcotic drugs is not required to produce any information by 26 USC §4705(a). To the extent that he might be considered subject to other provisions of the Act, he is not within the class of persons entitled to register or pay the special tax unless legally qualified under State and Federal law.

3/ The order forms required by §4705(a) are only available to persons who have registered and paid the special tax. 26 USC 4705(f).

4/ 26 CFR 151.23, 151.24.

By a lengthy and well reasoned opinion in the only case decided since those cited by appellant, the Second Circuit has recently sustained the instant statute against precisely the attack made by appellant here. Minor v. United States, 398 F.2d 511 (2nd Cir. 1968).

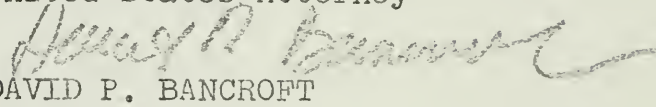
IV

CONCLUSION

We respectfully submit that the conviction should be affirmed.

Respectfully submitted,

CECIL F. POOLE
United States Attorney



DAVID P. BANCROFT
Assistant United States Attorney

JERROLD M. LADAR
Assistant United States Attorney
Chief, Criminal Division

CERTIFICATE OF SERVICE BY MAIL

This is to certify that two copies of the foregoing Brief of the Appellee were this date forwarded by Certified Mail, Return Receipt Requested, to the following:

Murray B. Petersen, Esq.
Attorney at Law
1500 Financial Center Building
405 - 14th Street
Oakland, California 94612

Attorney for Appellant

DAVID P. BANCROFT
Assistant United States Attorney

DATED: APRIL 14, 1969

McConney v. United States
C.A. 9th No. 22722
Criminal No. 41110 - DCND California

NO. 22722

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FOR THE NINTH CIRCUIT

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V.

UNITED STATES OF AMERICA

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT

MURRAY B. PETERSEN,

ATTORNEY FOR APPELLANT
1500 Financial Center Building
405 - 14th Street
Oakland, California 94612
Telephone: 415/835-8676

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MURRAY B. PETERSEN,

ATTORNEY FOR APPELLANT
1500 Financial Center Building
405 - 14th Street
Oakland, California 94612

Telephone: 415/835-8676

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JURISDICTIONAL STATEMENT

This is an appeal from an order made November 14, 1967, and entered in Criminal docket November 15, 1967, by the United States District Court for the Northern District of California, pursuant to a finding of guilty to one count of unlawful sale of narcotic drug in violation of title 26, U.S.C. §4705 (a). Pursuant to Grand Jury indictment 41110 in the aforementioned court, the district court's jurisdiction was invoked under 26 U.S.C. §4705 (a), Unlawful Sale of Narcotic Drug - Heroin. Defendant's motion for new trial was made, filed and denied November 14, 1967. Defendant gave timely notice of intent to appeal the conviction on the 14th day of November, 1967. Jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under the previsions of 28 U.S.C. §1291.

FACTS OF THE CASE

Appellant was charged with one count of violation Title 26, U.S. Code §4705(a) to wit: Unlawful Sale of Narcotic Drug - Heroin (Sale without transfer, completion, filing and retention of Treasury Department form), in a three-count indictment in which his co-defendant on the first count, Paul F. McAlee, was named as sole defendant on the succeeding counts. Appellant was found guilty as charged in a jury trial in the U.S. District Court for the Northern District of California, the Honorable Alfonso J. Zirpoli presiding. Judge Zirpoli also presided over the prior trial of first count co-defendant, Paul F. McAlee.

The circumstances leading to appellant's arrest were as follows: A Federal Agent, Stephen S. Chesley, arranged through Jesse Coy, an ex-felon and a paid Federal informer, for a sale of narcotics to take place at 1650 Oxford Street, Apt. No. 7, in Berkeley, Alameda County, California. On the date of the alleged transaction, Agent Chesley met the informer, Jesse Coy, in the living room of said apartment. Following some minutes of conversation, McAlee appeared, and, indicated that everything was ready. Agent Chesley gave Coy some marked money. The interior of the bathroom could not be seen from Agent Chesley's position in the living room, but evidence is conflicting as to whether the bathroom door was open or closed at that time and

accordingly is also conflicting on whether the conversation between McAlee, Coy and Agent Chesley could be heard from the bathroom and therefore form the basis for an adoptive admission of complicity in a conspiracy. Evidence was also conflicting on whether any view of the interior of the bathroom was possible from any position Agent Chesley may have occupied in the hallway. Coy tendered the marked money to co-defendant McAlee in the bathroom. Evidence is conflicting as to whether McAlee directed it be handed to Appellant McConney or if appellant siezed the money from McAlee. Appellant McConney departed the apartment house with the marked money. McAlee, in exchange for the tender of marked money, showed to the paid informer, Jesse Coy, a paper tablet on which was a white powder. Coy picked up the paper tablet with the white powder and then handed it to Agent Chesley who then administered an identification test in the living room. It was later determined that the powder did contain some heroin.

Before the commencement of the trial, defense counsel moved for a continuance to obtain the presence of a necessary material defense witness, Jesse Coy, who was absent but who had been ordered to report to the U.S. Attorney Bancroft prior to the trial for the purpose of being available as a defense witness. The paid informer, Jesse Coy, had been named in a Federal warrant as a reluctant material witness at a previous mistrial of the case and had been ordered to remain available to testify at the next trial. Notwithstanding the prior order and warrant and the

obligation of the U.S. Attorney to assist in obtaining the presence of the informer, Coy, as ordered by the court, the matter was left in the hands of the Berkeley Police Department who failed to produce the witness. Defense counsel had reasonably relied upon the efforts of the Federal authorities to procure the attendance of the paid informer, Jesse Coy, since counsel's previous efforts to obtain the presence of this witness had been frustrated until the Federal Marshal had arrested him and placed him in custody.

The trial court denied Appellant's motion for a continuance, although an affidavit in support thereof was submitted and an offer of proof made, that the testimony of Coy was essential to the defense case and also that he, Coy, could probably be located and his attendance procured in about 30 days. The prosecution, U.S. Attorney Bancroft, the same person ordered by Judge Carter to produce the reluctant witness, (Appendix C) resisted the motion for a continuance on the sole basis that the defense counsel had failed to show that the absent witness could be procured within a reasonable time.

Although denying the continuance for the purpose of obtaining the presence of the absent material witness, the trial court admitted into evidence a tape recording of a prior interview with the witness. The contents of this interview were contrary to and contradictory of the sworn testimony made by informer Coy at the prior trial of co-defendant McAlee. The evidence of

the statements made on the recording was limited by motions of the prosecution and admitted only insofar as they contradicted prior testimony of Coy made during the trial of co-defendant McAlee and were thus against his, Coy's, penal interest; i.e., the danger of prosecution for perjury. Thus limited, the tape recorded statements were admitted.

The trial court refused to allow the testimony of defense witnesses, Chris Reume and Nancy Renner, in re Jesse Coy's background notwithstanding the fact that their testimony was to have been corroborative of and a replacement and substitution for that which was denied to the defense by virtue of the absence of the informer Jesse Coy. The witness Coy's absence prevented the foundation necessary to completely show the relevancy of the testimony of witnesses Reume and Renner.

The trial court, over defense objection, permitted testimony of Agent Chesley containing heresay statements made by informer Coy and, only after the jury had heard the hearsay statements, was some of the testimony stricken.

Throughout the trial, the court broke into the examination of witnesses and appellant and participated in the cross examination of appellant, all in full view of, and within hearing of the jury.

The court recalled testimony from the prior trial of first-count co-defendant, McAlee, and although the information was not in evidence or otherwise before the court, refused the

defense counsel's offer of proof, solely on the basis of this recollection.

SPECIFICATIONS OF ERROR RELIED UPON

1) The District Court erred in not granting Appellant's motion for a continuance in order to obtain the presence of an essential material defense witness, Jesse Coy in contradiction to the guarantees of compulsory process and due process contained in the Sixth and Fifth Amendments of the U. S. Constitution, and further erred in refusing to admit the related and coorberative testimony of defense witnesses, Chris Reume and Nancy Renner.

2) The District Court erred in taking over the examination and cross-examination of the Appellant and important witnesses within the hearing and within the full view of the jury and thus inferentially showing a preference for the prosecution and denying the appellant a fair and impartial jury and trial guaranteed by the Sixth and Fifth Amendments of the U. S. Constitution.

3) The District Court erred in admitting what was obviously hearsay testimony over objections of defense counsel and thus denied to appellant the procedural due process guaranteed under the Fifth Amendment to the U. S. Constitution.

4) The District Court erred in applying the Federal Statute relating to illegal sales of narcotics [26 USC 4705(a)] which statute violates the provisions against self incrimination contained in the Fifth Amendment to the U. S. Constitution.

QUESTIONS PRESENTED

1. Did the District Court commit error in not granting appellant's motion for a continuance in order to obtain the presence of an essential material defense witness, and did the District Court commit further error by denying a renewal of said motion during the course of the trial after the importance of the testimony of the absent witness had become apparent to all concerned?
2. Did the District Court commit error in taking over the examination and cross-examination of both prosecution and defense witnesses and the examination and cross-examination of the appellant, when in doing so, the trial court interjected itself 96 times into the proceedings within the sign and hearing of the jury?
3. Did the District Court commit error in admitting hearsay testimony over defense objection, which testimony was an important link in the prosecution's proof of appellant's complicity or conspiracy in the crime charged?
4. Did the District Court commit error in applying the Federal Statute relating to the illegal sale of narcotics [26 USC 4705(a)] because compliance with this statute requires a defendant to incriminate himself in violation of the provisions of the Fifth Amendment to the United States Constitution?

SUMMARY OF ARGUMENT

The District Court committed error in not granting appellant's motion for a continuance for the purpose of obtaining the presence of an essential material defense witness. Besides the violation of the compulsory process clause of the Sixth Amendment, the denial of appellant's motion was particularly reprehensible since the prosecution was under Court Mandate to produce the absent witness at the trial. The District Court committed further error and further denied appellant's rights under the Fifth and Sixth Amendments to the Constitution when it denied the renewal of appellant's motion for a continuance, when the importance of the testimony of the absent witness had become apparent to the court, the jurors and the counsel.

The District Court committed clear error in frequently taking over the examination and cross-examination of witnesses within the view and hearing the jury and committed further error in taking over the examination and cross-examination of the appellant; thus, causing the jurors to over-emphasize certain phases of the testimony and to create the impression that the court was doubtful of appellant's veracity.

The District Court committed clear error in admitting the hearsay testimony over the defense objection, which testimony was a significant link in the chain of the prosecution's proof of appellant's complicity or conspiracy in the crime charged. In doing so, the District Court denied the appellant his Constitut-

ionally guaranteed right of confrontation and cross-examination.

The District Court committed error in applying the Federal statute relating to the illegal sale of narcotics [26 USC 4705(a)] since this statute and other statutes related to and implementing it require a person subject to the provisions of the statute to incriminate himself in violation of the provisions of the Fifth Amendment to the United States Constitution.

I

THE DISTRICT COURT COMMITTED ERROR IN NOT GRANTING APPELLANT'S MOTION FOR A CONTINUANCE IN ORDER TO OBTAIN THE PRESENCE OF AN ESSENTIAL MATERIAL DEFENSE WITNESS, AND COMMITTED FURTHER ERROR BY DENYING A RENEWAL OF SAID MOTION DURING THE COURSE OF THE TRIAL AFTER THE IMPORTANCE OF THE TESTIMONY OF THE ABSENT WITNESS HAD BECOME APPARENT TO ALL CONCERNED.

At the commencement of the trial of appellant herein, defense counsel, surprised at the nonappearance of the material defense witness and paid government informer, Jesse Coy, moved the court for a continuance in order to procure the attendance of this defense witness. RT 2:14-18.* In doing so, defense counsel submitted an affidavit certifying to the importance and materiality of the anticipated testimony and the diligent efforts which counsel had made to obtain the presence of this witness. RT 2:18-21, Appendix A and B, Affidavit of Arthur Wells, Jr., First and Second Supplemental Record on Appeal. Defense counsel also made oral representations that the absent witness could probably be located within a reasonable time, should the continuance be granted, RT 3:1-3, and further stated, both in his affidavit and in open court, that it was defense counsel's opinion that the presence of this witness at the trial was necessary for the defense, Appendix B, RT 3:8-9.

Great diligence was displayed by defense counsel in procuring informant Coy's attendance at the previous mistrial in July of 1967 (App. A & B, First and 2d Supp.) This extreme diligence and effort of defense counsel further exemplifies to this court the

*Reporter's Transcript

importance placed upon the testimony of Mr. Coy.

At the previous mistrial of appellant herein, occurring in July 1967, the attendance of the informer, Coy, had been obtained only after he had been arrested and put in custody as a material witness. This procedure, was made necessary by Mr. Coy's refusal to receive defendant's subpoena and his further refusal to receive a government subpoena. Those persons attempting to serve the subpoenas on Mr. Coy reported that he had armed himself with a rifle and butcher knife and barricaded himself in his apartment. Thus frustrated in their efforts to procure the attendance of the material witness, Jesse Coy, the defense next sought and succeeded in obtaining, a Federal Warrant for Coy's arrest as a material witness. Upon being placed in custody and brought before a magistrate, the informer, Coy, was then released to the custody of David P. Bancroft, the Assistant U.S. Attorney and Prosecutor of Appellant, herein.

On the second day of the July 1967 trial, the judge declared a mistrial and ordered the material defense witness, Coy, to make himself available as a material witness when the trial recommenced and in so doing, Judge Carter ordered as follows, as appears in the Reporters Transcript of the proceedings of July 24, 1967. (App.C, RT of prior trial of July 1967, 3rd Supp.)

"THE COURT: Mr. Coy, would you step forward, please. Step right up here.

THE CLERK: This is Mr. Jesse Coy; isn't it?

"MR. WELLS: Over here (indicating).

THE COURT: Mr. Coy, I have just declared a mistrial in this case and it will have to be set for trial again by the calendar judge and I am instructing you that since you are presently under a warrant as a material witness that you are under the order of the Court to be available as a witness and you are to be subject to the instructions of Mr. Bancroft, who is the attorney for the Government, who will advise you as to the trial date*-- next trial date of this case and that you will report to the office of the Berkeley Police Department at eight o'clock in the morning on the morning on which that case is set for trial to be available as a witness in this case.

MR. COY: Yes, sir.

THE COURT: I am doing this because I understand this meets with your convenience.

MR. COY: Yes; yes, sir.

THE COURT: All right. Then if that is the situation, that will be the order; and, Mr. Bancroft will notify you.

MR. BANCROFT: Certainly, your Honor.

THE COURT: And, you will then be available to be a witness in this case.

*(Emphasis Added)

"MR. COY: (Nodding affirmatively).

THE COURT: All right. Then, other than that, I will excuse you then. Then you can go about your business.

MR. COY: Yes, sir; thank you.

MR. BANCROFT: Thank you, your Honor.

(At which time there was discussion between Court and Counsel as to bail, exhibits and instructions; after which time, the Court adjourned the proceedings.)"

From the foregoing, it is eminently clear that defendant-appellant and his counsel were entitled to rely upon the court's instructions to David P. Bancroft, Esq. and to expect that the material defense witness, Jesse Coy, would be present in court at the next hearing date. This clearly appears by the Affidavit of Arthur Wells, Jr., Appendix B and the Order of the Court on July 24, 1967. (Supra) Appendix C. It is also apparent that the Federal authorities were the only persons charged with the responsibility of producing this material defense witness and further, that the Federal authorities had the only procedural machinery likely to be effective in obtaining the presence of the witness at trial and, still further, that the defendant could not expect the witness to cooperate, voluntarily.

A criminal defendant is entitled to have compulsory process for obtaining witnesses in his favor, United States

Constitution, Amendment 6, which states as follows:

> "Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis added).

It is clear by reading this Amendment and considering the plain meaning thereof, that the denial of an opportunity to have a witness testify in his behalf is a denial of the guarantee of compulsory process of the Sixth Amendment. When a denial of the opportunity to have a witness appear in his behalf is the fault of the prosecution, then the violation of the guarantees of the Sixth Amendment are even more reprehensible. Barber v. Page, 390 US 719, 88 S.Ct. 1318, 20 L Ed.2d 255. As has been clearly proved heretofore, the prosecution had the responsibility to obtain the presence of the absent witness; had exclusive control of the necessary process to obtain his presence; failed to produce the absent witness' presence and, further, failed to show any diligence whatsoever in attempting to obtain this absent witness' presence, RT 79: 2-25, 80: 1-19. The questioning proceeded as follows:

> "MR. WELLS: I would like to just go ahead and inquire further. The stipulation is of no point. I will accept the stipulation he was under court order

to be here.

THE COURT: Now, do you want to further develop that?

MR. WELLS: I don't want to further develop that.

THE COURT: I think I should myself. If you gentlemen won't, I will do it.

You say you saw him last in court, is that right?

THE WITNESS: After court was over, yes, sir.

THE COURT: Had the Court given directions to this man to return?

THE WITNESS: That's correct.

THE COURT: And have you seen him since?

THE WITNESS: No, I have not.

THE COURT: Have you made any effort to find him or locate him since?

THE WITNESS: Yes, sir.

THE COURT: Have you been able to find him or locate him since?

THE WITNESS: No, sir.

MR. WELLS: Q. What efforts have you made?

A. The Berkeley Police Department.

THE COURT: You requested them to find him?

THE WITNESS: That is correct.

MR. WELLS: Q. Did you go out looking for him yourself?

A. I haven't had the time, sir.

Q. You haven't had the time?

A. That's correct.

Q. You had more important things to do?

A. I have been out of town the vast majority of the last two months, sir.

Q. Did anyone else in your department go looking for him, to your knowledge?

A. To my knowledge, I believe some of them have. I'm not sure.

Q. You don't know what they have done in that regard?

A. No, sir, I don't.

Q. You haven't followed it up since you came back from out of town?

A. I just came back Friday."

So reprehensible is such conduct that it has been held that if the absence of the witness is chargeable to the negligence of the prosecution, rather than to the procurement of the accused, evidence given in a preliminary hearing by such witness before a United States Commissioner cannot be used at the trial. Motes v. U.S.,178 U.S.458(1900),44 L.Ed.1150,20 S.Ct.993. It is not clear in the instant case whether the testimony of Jesse Coy was used at a preliminary examination or not. However, the holding of the Motes case, (supra) is cited here to show the importance which must attach to the prosecution's hindering the defense efforts to pro-

duce this essential material witness.

Compulsory process, as referred to in the Sixth Amendment to the United States Constitution, particularly where ordered by a Federal Judge, Appendix B and C, obviously requires a degree of diligence and good faith in its performance far greater than was provided in the instant case.

Despite the evident importance of this absent material, witness' testimony and the diligent efforts of the defense in attempting to procure his presence at trial and the inability of the defense to do so without the cooperation of the Federal authorities, we nevertheless find the Prosecuting Attorney David P. Bancroft, who was charged with the responsibility of producing that witness in court, objecting to the defense motion for a continuance. RT 3:24-25. On this basis alone, and without going further, it can be said that the Prosecuting Attorney, David P. Bancroft, here assumed a most inconsistent position in that he had the responsibility to produce the witness [p. 3 this Brief, Supra) was dilatory in not doing so, [RT 79:2-25, RT 80:1-19] and then rather than apologizing to the court for his failure to perform, instead proceeded to object to the defense motion for the continuance which, by any measure, would be considered reasonably necessary in view of the defense's surprise at the absence of this essential witness, RT 6:1-2.

When we consider the foregoing, as well as U. S. Attorney Bancroft's objections to the introduction of the taped statement

of the absent witness, even after stating to the court his willingness to allow its admission, RT 4:9-15, and his further energetic objections to the testimony of defense witnesses Chris Reume and Nancy Renner, RT 174:6, 17-19; RT 179:12-13, it is very apparent that the absence of Jesse Coy was just as important to the prosecution's case as the presence of Jesse Coy was important to the defense. At this point, if not before, there could have been no doubt that Jesse Coy was an essential and material witness.

In the face of the foregoing, it is very clear that the trial court overstepped its bounds of discretion in denying the motion for the continuance. Denial of a reasonable request to obtain the services of a necessary witness is effectively a suppression of evidence and is a violation of the fundamental right of due process. United States vs. Pate, 345 F.2d 691 (1965). The court saying there at page 696:

> "In the wake of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action, it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection. This right is as 'implicit in the concept of ordered liberty' as the right to counsel . . . . . Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in Paoni v. United States, 281 F. 801 (3rd Cir. 1922)."

In accord with the Pate case, and further holding that

failure to stay within proper bounds of discretion is basis for appellate court intervention, is the case of Scott v. United States, 263 F.2d 398. In that mail fraud case involving a charge of conspiracy, a co-conspirator failed to appear, although process to obtain his presence had been instituted. The court held that the trial court's discretion in not granting the postponement for the purposes of obtaining the presence of the absent witness, was necessarily subject to review and to correction, since its just limits had been exceeded. The appellate court then stated that it was a virtual error to deny the continuance, saying at page 401:

> "Desirable, indeed necessary, as it is to proceed with criminal trials without undue delay, indeed with proper dispatch, and wide as is the discretion of the court in passing on applications for postponement, the exercise of that discretion is necessarily subject to review and to correction when its just limits have been exceeded. The same thing is true of the granting of a mistrial."

Accord: Younge vs. United States, 223 F.941 certiorari denied, 245 U.S. 656, 38 S.M. 13, 26, L.Ed. 533 (1917). In this case, it was held that the trial court should have ordered a postponement even after the trial had commenced, in order to procure the presence of the absent witness. In the instant case, as the trial progressed, the importance of the testimony of the absent witness became increasingly apparent, to the court and jurors aloke. The trial should have followed the rule of the Younge case, (supra) and ordered a mistrial or continued the

matter until the absent witness' presence could be assured when given the opportunity by defense counsels' renewed motion for a continuance, RT 86:20-25, 87:1-8.

In view of the reasonableness of the defense motion for a continuance to obtain the presence of a necessary material witness, the exclusiveness of the responsibility of the prosecution to produce this witness and its dilatory failure to do so, we come to the inescapable conclusion that the trial court committed clear error in failing to grant the defense motion for a continuance. There is no remedy now except for the Court of Appeals to order a new trial.

II

THE DISTRICT COURT COMMITTED ERROR IN TAKING OVER THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES BEFORE THE JURY AND IN TAKING OVER THE EXAMINATION AND CROSS-EXAMINATION OF THE DEFENDANT-APPELLANT, WHEN IN DOING SO, THE TRIAL COURT INTERJECTED ITSELF 96 TIMES INTO THE PROCEEDINGS WITHIN THE SIGHT AND HEARING OF THE JURY.

The trial court interrupted the proceedings 96 times between the hours of 2:00 p.m. on the first day of trial and 12:00 noon on the following day, Appendix D. In so doing, the court asked specific questions of both prosecution and defense witnesses and engaged in the examination and cross-examination of the defendant-appellant (See Appendix D). In so doing, the trial court wrested control of the proceedings away from trial counsel and vested it in itself and therefore emphasized in the minds of the jury the importance of the questions asked by the court as distinguished from questions asked by counsel. This indiscriminate and prejudicial interference by the court was objected to by defense counsel, RT 35:6-7, and prosecution, RT 45:4-7. In making these objections, however, it is apparent that both defense and prosecution were aware of the political expediency of avoiding the antagonism of the court, since their objections were couched in non-aggressive terms.

Notwithstanding the short cessation of this improper questioning by the trial judge, it is clear that its prompt resumption, RT 39:3-4; RT 46:22-24 and the conduct of the trial court through-

out the trial in taking over the examination of witnesses and constantly interjecting comments and questions of its own, was sufficient to prejudice appellant's case since the court appeared to the jury to have cast off its cloak of impartiality whenever it interjected itself into the questioning of witnesses. Such conduct warrants a reversal of the lower court's decision, Williams v. United States, (DC App.Ct.) 228 At1.2d 846, wherein the court, in reversing the conviction, stated at page 847:

> "The judge must not inject himself into the examination or cross-examination of witnesses as to assume the role of an advocate, or seem to favor one party against the other, especially in a criminal case."

Then the court continued at page 848:

> "A trial judge has the responsibility of moving a trial along in an orderly and efficient manner; in short, he has the responsibility of managing the conduct of a trial. But that does not mean overmanaging, certainly not to the point of repeated overparticipation in examination of . . ."

Where a court cross-examines defendant's witness in a prosecution and thereby casts doubt on the credibility of the witness and a conviction results, the prejudicial conduct of the court requires a reversal of the judgment on appeal and the granting of a new trial. People of the State of New York v. Kenney, 246 NY Supp 2d 92.

In the case of Jackson v. United States, 329 F.2d, 893 (1964), the court pointed out that a trial court may intercede to overcome seeming inadequacy of the examination of witnesses. However

helpful as this is in non-jury trials, the court should exercise considerable restraint before attempting to do so before a jury because of the prejudicial consequences of the judge's intervention. The appellate court there noted an inordinate number of instances of extensive examination and cross-examination of witnesses and comments by the court and concluded that the cumulative effect of all the trial judge's participation could well have been prejudicial and, at the very least, could have led jurors to give undue weight to the points treated by the judge. The court stated at page 894:

> "That the judge may be able to examine witnesses more skillfully or develop a point in less time than counsel requires does not ordinarily justify such participation. That is not his function."

The instant case is not one in which the trial court was making available to the jury information not otherwise brought out by inexperienced counsel. It is quite apparent that both prosecution and defense counsel were experienced in trial matters and could well have benefited without the constant interruptions from the bench. Although defense counsel, Arthur Wells, Jr., objected to the court's interference, he did so in guarded terms, showing acute awareness of the possible danger to the defendant's cause by a forceful statement of the objection. After a long period of standing while the trial court took over his cross-examination of a witness, defense counsel stated at RT 35:6-7:

> "MR. WELLS: I am through with my cross-examination,

so I might as well be seated."

and at RT 45:4-7, the prosecution similarly objected as follows:

"MR. BANCROFT: Your Honor, if I may have this witness for just two more minutes I think Your Honor will see the purpose for this kind of examination, if I could try to establish some distances for foundation purposes."

From the foregoing, it is clear that both counsel were bothered and embarrassed by the court's extensive questioning of the witnesses, but fully realized the risk of emphasis that would result from a strong objection. As stated in U.S. v. Hill, 332 F2d 105(1964)p106

> "Counsel for defendant in a criminal case, is indeed in a difficult and hazardous predicament in finding it necessary to make frequent objections in the presence of a jury to questions propounded by the trial judge. The jury is almost certain to get the idea that the judge is on the side of the Government. The cloak of impartiality which the judge should wear is destroyed."

Although the prejudice of the court's examination of witnesses clearly influenced the course of the trial, by far the most damaging part of the trial court's interference was in the active participation which it took in the cross-examination of the appellant-defendant, RT 197:7-21, which proceeded as follows:

"THE COURT: May I ask one question? Just how

much money did he owe you?

THE WITNESS: Exactly it was around --

THE COURT: Not around. Didn't you know exactly?

THE WITNESS: I had it written down on a little paper.

THE COURT: Oh, you did have it written down on paper.

THE WITNESS: Yes.

THE COURT: I thought a moment ago you said you didn't keep any record of the amount of money he owed you. (Emphasis added)

THE WITNESS: I didn't say I didn't keep a record of it, I said most of the time I keep it in my head.

THE COURT: All right, how much did he owe you?

THE WITNESS: I had it down for $537."

The court continued at RT 200:24-25:

"THE COURT: All right, he said no. Didn't he ask you why he should go there?"

From the foregoing, it is clear that in the instant case the questions asked by the trial court were not only inquisitive, but also obviously demonstrated to the jury that the court was doubtful of the veracity of the defendant. Such conduct on the part of the trial court is reversible error. U.S. v. Hill, 332 F2d 105 (1964).

Seeming unfairness or partiality of the trial judge constitutes prejudicial error requiring a reversal of the conviction and a remand for a new trial. In furtherance of this doctrine, the court said in the Hill case (supra), at page 106:

> "A fair and impartial trial is guaranteed to every defendant, and fundamentally means a trial before an impartial judge and by an impartial jury. In aid of truth and in furtherance of justice, the court may question a witness, -- in fact he may call and question a witness not used by either party, -- but in so doing the court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that defendant was guilty. . . ."

In accord is United States v. Carmel, (7th Cir.) 267 F2d 345, 350, where this court stated:

> "We realize that an alert and capable judge at times feels that he can assist in developing the evidence by participating in the interrogation of witnesses. However, he would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the ever-observant jurors."

In the instant case, appellant-defendant was forced to take the stand because he was denied the opportunity to have witnesses appear in his behalf, (See Arguments I and III).

Over a period of time which took three pages of the Reporter's Transcript, RT 197:7-21, RT 200:24-25, RT 201:3-16, the court examined, ridiculed and castigated the appellant before the jury, thus causing such irreparable prejudice to the defendant's case

that it can now be remedied only by a new trial. It is essential in the interest of justice, as well as in the furtherance of the Constitutional guarantee of a fair and impartial jury (U.S. Const. Amend.VI) that this appellant be accorded a new trial. The Sixth Amendment provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." (Emphasis added.)

A jury cannot long remain impartial in the face of the trial court's critical cross-examination of defendant-appellant. It is clear that appellant herein was denied his Constitutional guarantees of a fair jury by the court's expressed doubt of appellant's veracity. Page 16 (this Brief).

The U.S. Court of Appeals for the 7th Circuit decided a case similar to that of appellant herein, in United States v. Hill, 332 F.2d, 105 (1964). In that case, the trial court asked 35 questions of the defendant on cross-examinations. In reversing the lower court decision, the appellate court stated that a number of the questions were so phrased that the jury might well have received the impression that the judge was doubtful of the truthfulness of many of the defendant's statements made under oath.

When the Constitution requires a hearing, it requires a fair one, held before a tribunal which at least meets currently prevailing standards of impartiality. Wong Yang Sung v. McGrath, 339 U.S. 33, P.50 (1950), 94 L.Ed.616, 70 SC 445.

In addition to the foregoing, the cumulative effect of a court's questions and statements can constitute prejudicial error, requiring a new trial. United States v. Hill, 332 F.2d 105 (1964).

In the instant case, the trial court attempted to recover from the error of constantly interjecting comments and questions into the trial. In its instructions to the jury at RT 230:15-24 inclusive, the court stated:

> "During the course of the trial I asked questions of the witnesses in order to bring out facts not then fully covered by the testimony. Do not assume that I hold any opinion as to the matters to which my questions relate. Remember at all times that you as jurors are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts. You will note I say 'comments of the Court' in arriving at your findings as to the facts. I am talking about my comments as they relate to facts, not as they relate to the law." (Emphasis added)

This instruction is clearly not corrective or remedial of the situation accumulating during the trial of appellant herein. The court instructing as above, informed the jurors that they were at liberty i.e. could voluntarily disregard the comments of the court. This is in no sense a mandate to disregard the court's participation, nor could it in any sense accomplish it's intent i.e. to erase the memory of the jurors. Obviously, the court's comments and the impression which they created were still in the minds of the jurors and permission to erase the recollections which created them, could not possibly remedy the wrong done.

Inflammatory and prejudicial testimony admitted, as in the

instant case, can be so damaging that no amount of cautionary instruction can eradicate the impression of the testimony from the juror's minds. Hilton v. United States, (5th Cir.) 221 F.2d 338.

In view of the foregoing, and because the trial court clearly exceeded the bounds of propriety in its participation, over objection, in the examination and cross-examination of witnesses and defendant; thus improperly influencing the jury by emphazing certain phases of the trial and casting doubt on the veracity of the defendant, we come to the inescapable conclusion that the trial court committed clear error, and appellant herein must be accorded a new trial.

III

THE DISTRICT COURT COMMITTED ERROR IN ADMITTING HEARSAY TESTIMONY OVER THE DEFENSE OBJECTION, WHICH TESTIMONY WAS THE PRINCIPAL BASIS OF THE PROSECUTION'S PROOF OF APPELLANT'S COMPLICITY IN THE CRIME AND WHICH HEARSAY TESTIMONY DEPRIVED APPELLANT THE CONSTITUTIONALLY GUARANTEED RIGHT OF CONFRONTATION.

During the course of appellant's trial the prosecution relied heavily on hearsay testimony of Agent Chesley to establish appellant's alleged connection with the events forming the basis of the offense charged. The use of hearsay testimony is governed by the provisions of the Fifth Amendment due process clause and the Federal Rules of Criminal Procedure. The Fifth Amendment of the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added)

The procedural due process referred to in the Fifth Amendment is defined in Ex parte Wall, 107 US 265, (1883) where the court states at P.289:

> "In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the estab-

lished customs and usages of the courts."

Furthermore, in criminal prosecutions, the due process clause of the Fifth Amendment supplements the specific procedural guarantees enumerated in the Sixth Amendment and also supplements the preceding clauses of the Fifth Amendment for the protection of persons accused of crime. Crain vs. United States, 162 US 625, p.645 (1896). In supervising the conduct of the Lower Federal Courts, the functions of the Supreme Court included the duty to establish and maintain civilized standards of procedure and evidence. McNabb vs. United States, 318 US 332 (1943).

Rule 26 of the Federal Rules of Criminal Procedure states as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principals of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

It is clear that in Federal Courts, the common law rules of evidence prevail.

No one seriously questions the proposition that the hearsay rule is inherent in the Anglo-American common law rules for the admissibility of evidence, McCormick on Evidence in § 223, 5 Wigmore Evidence 27 (3rd Ed.1940), since its popularity grew with the transition from depositional to witnesses' oral testimony in

the latter part of the 17th century, predating the origins of this country by 100 years. Statutes have frequently been enacted excluding hearsay evidence as being inherently untrustworthy and unreliable. In California, the prohibition of hearsay is codified in Division 10, Chapter 2 in the California Evidence Code, §§ 1200 to 1205 inclusive. In Busby v. United States of America, (9th Cir.1961) 296 F2d 328 at page 332, hearsay was defined as "that evidence of out of court assertions by third persons which is admitted to prove the truth of the matter asserted."

In Criminal Prosecutions the use of hearsay evidence to convict a defendant is especially reprehensible since the defendant's life or liberty are usually at stake. The unavoidable incident of hearsay testimony is that the person who spoke is not present in court, therefore not subject to the safeguards of cross-examination and not visible to the jury so his demeanor can be observed during the course of his questioning.

In the instant case, the prosecution introduced hearsay testimony of co-defendant, Paul F. McAlee's statement made out of court and implicating the appellant by way of complicity or conspiracy in the alleged crime RT 66:1-7. In doing so, the prosecution effectively prevented the appellant from having the opportunity of cross-examining this witness. The record is silent as to the disposition of McAlee's case, however, it is clear that he did not appear to testify at appellant's trial. Thus it was that appellant was accused by an absent witness and was thus

denied his guarantee of confrontation provided in the Sixth Amendment of the United States Constitution. (Supra). The right to confront witnesses at the time statements are made is paramount in a criminal trial. Goings v. United States, (8th Cir. 1967) 377 F2d 763. Stated differently, the right of cross-examination is included in the Constitutional right of every accused to be confronted with the witnesses against him. United States v. Bozza, (2d Cir. 1966) 365 F2d 206. Furthermore, this right of cross-examination cannot be side-stepped because it happens to be convenient for one of the parties. Holman v. Washington, (5th Cir. 1966) 364 F2d 618.

The testimony should not have been admitted for the additional reason that it did not qualify under any exception to the hearsay rule propounded at the trial.

In the instant case, hearsay testimony of Agent Chesley was admitted as to what co-defendant Paul F. McAlee had said upon reporting to Chesley and Coy that everything was ready. Over defense's objections, RT 58:7, he was permitted to testify as follows: RT 66:1-7.

"MR. BANCROFT: Q. Agent Chesley, I am referring to that point in your testimony in which you stated -- at which Paul McAlee, the second man involved here, appeared out of the hallway into the living room. Did he state anything when you saw him so appear, did he state anything at all?

A. Yes, he said, 'We are ready, get the money.'"

The answer, above quoted, was clearly hearsay and objectionable as such and further, was obviously an attempt by the prosecution to show a "conspiracy and/or joint venture" as between McAlee and appellant. The prosecution's theory seemed to be that the statement was admissible, either as the statement of an agent or as an adoptive admission. Both arguments must fail; first, since there was no showing that McAlee was an agent authorized to speak for appellant, McCormick, Evidence (1954 ed) §244 and secondly, adoptive admission, because to be effective as such, it must first appear that the statement was made, heard and understood by the person from whom the objection is expected, McCormick, Evidence (1954 ed) §247 p.530. In the instant case evidence is conflicting as to whether the bathroom door was open or not and accordingly, conflicting as to whether appellant McConney who, it is well established, was in the bathroom at the time, could have heard the statement of McAlee to Coy and Chesley. McConney's uncontradicted testimony was that he did not hear any statement. The audibility of the tone as heard by Agent Chesley in the living room, was irrelevant since that does not establish the fact of its being audible to McConney across the hall in the bathroom with possibly a closed door, intervening. It is further apparent that there was no showing that the innocuous phrase "we are ready", even if said, was such as to require denial by appellant. Evidence

of an accusatory statement and defendant's failure to deny same is admissible only if circumstances are such as to warrant the inference that defendant would naturally have contradicted a statement if he did not assent to its truth. Kelly vs. United States, 236 F2d 746. In the instant case, no such circumstances were present. It wasn't even established that the defendant could have heard whatever statement might have been made. In Kelly v. United States, (Supra) the court stated the further proposition that evidence and statements made by persons other than witnesses introduced in order to establish truth of statements are inadmissible as hearsay. The court further stated that the admisssion of this hearsay alone would have constituted sufficient ground for a reversal. In discussing adoptive admissions, the court further observed at page 750:

> "the cases repeatedly emphasize the need for careful control of this otherwise, hearsay testimony." (Citing case)

In view of the foregoing, it is clear that the quoted hearsay testimony (supra) was improperly admitted over defense objection and the trial court committed clear error in so ruling, thus depriving appellant herein of the due process guarantees of the Fifth Amendment to the Constitution.

Notwithstanding technical offensiveness of the testimony quoted (supra) as hearsay, a further objectionable aspect appears. At this point in the trial of appellant it had become apparent that co-defendant McAlee's statement "we are ready" if made, was

extremely damaging to the appellant in this case as suggesting a conspiracy or the complicity with the appellant. At this time, the trial court should have realized the importance of the testimony of this absent witness and further required that by allowing introduction of this testimony that the trial court was denying appellant herein, the opportunity of cross-examining this witness in violation of the confrontation clause of the Sixth Amendment to the United States Constitution.

In absence of waiver, clearly not present in the instant case since timely objection was made, a defendant's Federally guaranteed Constitutional right to confrontation is denied by a denial of the right to cross-examine witnesses who testified against him. Brookhart v. Janis, (1966) 384 US 1, 86 Sup.Ct. 1245, 16 L.Ed.2d 314. The cross-examination of the accuser is a major reason underlying this Constitutional guarantee of confrontation. Pointer v. State of Texas, (5th Cir. 1965), 380 US 400, 85 Sup.Ct. 1065, 13 L.Ed.2d 923.

Further prejudicial hearsay testimony was given when Agent Chesley acted as a rebuttal witness, RT 207:1 to RT 212:3, incl. Appearing on those pages were questions asked by the U. S. Attorney which, obviously elicited hearsay testimony from the witness. This was promptly objected to by defense counsel, at RT 208:1. The court, however, permitted the line of questioning to continue and thus to expose the jury to a great number of hearsay statements. Eventually defense counsel was forced to ask for a con-

tinuing objection to all this hearsay, RT 209:20-21. The line of questioning continued through pages 210 and 211, the court finally struck all of the testimony except the last answer of the witness, which was a hearsay answer to the court's own question. Defense counsel asked for an admonition by the court with respect to the jury's having to disregard the prior statements of the witness; however, it is clear that the jury could not erase their recollections, once having heard the statements, notwithstanding the court's order to strike the testimony and its admonition, RT 211:18-23. Indeed, the admonition was worded such that it is doubtful that it could have had much rehabilitative effect at all. The court's admonition was as follows: RT 211:18-23:

> "THE COURT: Yes, you're admonished to disregard the rest of the testimony about the conversation with McConney and what transpired on the street, but you are permitted to consider his statement that Jesse Coy told him he lied when he gave the statement at the office of the attorney." (Emphasis added.)

The statement "that Jesse Coy told him he lied when he gave the statement at the office of the attorney" was obviously sufficient to emphasize rather than de-emphasize the matters just previously heard by the jury. It is very clear that under the circumstances the prejudicial effect of the hearsay testimony remained with the jury notwithstanding the court's admonition.

Prejudicial error occurs when statements heard by the jury are so inflammatory and prejudicial that no amount of caution or instruction can irradicate the impression of the testimony from the jurors' minds, Scott v. United States, 263 F 2d 398.

It is just as clear that appellant was denied the Constitutionally guaranteed right to procedural due process as discussed heretofore. Had the court wanted to have the testimony determined as to its admissibility, this should have been done outside of the hearing of the jury. However, this was not done although other prior arguments and offers of proof were made while the jury was out of the courtroom.

In view of the foregoing procedural defects relating to the improper use of hearsay testimony and the resultant denial of due process resulting therefrom and particularly in consideration of other defects of appellant's trial as discussed heretofore, we again reach the inescapable conclusion that appellant herein must be awarded a new trial. This court should so rule.

IV

THE DISTRICT COURT COMMITTED ERROR IN APPLYING THE FEDERAL STATUTE RELATING TO THE ILLEGAL SALE OF NARCOTICS [26 USC 4705(a)] BECAUSE COMPLIANCE WITH THIS STATUTE REQUIRES A DEFENDANT TO INCRIMINATE HIMSELF IN VIOLATION OF THE PROVISIONS OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is a violation of appellant's privilege against self-incrimination, as contained in the Fifth Amendment to the Constitution, to require him to receive in writing, 26 USC §4705(a), and retain for two years, 26 USC §4705(d), the details of transactions of an inherently suspicious nature. It is a further violation to require appellant to divulge to authorities the details of such transactions, 26 USC §4705(d), and to require him to submit in writing detailed monthly reports of all his narcotic sales, 5 CFR §151.201. The implementation of this statute is unconstitutional basis for criminal prosecution.

Methods employed by Congress in federal tax statutes and ancillary provisions must be consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment, Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 695, 19 L.Ed.2d 889 (1968).

In Marchetti v. United States, supra, cited in Grosso v United States, (1968), 390 U.S. 62, 88 S.Ct. 709, 19 L Ed.2d 906, the Supreme Court held that an occupational tax placed on the petitioner created a "real and appreciable" and not merely "imaginary and unsubstantial" hazards of self-incrimination. The court

then pointed out, at page 48, that the petitioner therein was confronted with a comprehensive system of federal and state prohibitions against the activities which were taxed. He was, therefore,

> "Required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would prove a significant 'link in a chain' of evidence tending to establish his guilt."

The court pointed out in Grosso v. United States, supra, p.64, that, similar to Marchetti v. United States, supra, the penalties imposed, in combination with the Federal statutes, placed the petitioner entirely within "an area permeated with criminal statutes", where he was "inherently suspect of criminal activities". It was held that the claim of privilege against self-incrimination was a defense to this prosecution.

In the instant case, we have a situation similar to both that of Marchetti v. United States, supra, and Grosso v. United States, supra, in that persons trafficking in narcotics belong to a class of persons inherently suspect of criminal activities, which activities were closely proscribed and controlled by both federal and state statutes. As Justice Brennan stated, in his concurring opinion, in Grosso v. United States, supra,

> "The statute with respect to a wagering tax compelling disclosure was part of an interrelated statutory system design to coerce information from persons engaged in gambling activities. Significant of the activities

required was the registration of persons so engaged."

Substantially similar to this registration requirement are the provisions of 5 CFR §151.21 providing for registration of persons "who..... sells, deals in, dispenses, administeres, or gives away narcotics", and USC §4705(d) requiring the transferor in a narcotics transaction to retain the order form for two years and, as implemented by 5 Code of Federal Regulations §151.201, to report every month the transactions to the Narcotic District Supervisor for the district in which the vendor is located. In practical effect, these three provisions provide for a minimum two-year registration of a transferor of narcotics.

In Haynes v. United States, 1968 case, 390 US 85, 88 S.Ct. 722, 19 L Ed.2d 923, the Supreme Court held that the statutes requiring registration and taxation of persons suspected of possessing illegal firearms were contrary to the provisions of the Fifth Amendment in that the statute required the registrant to incriminate himself. In the instant case, appellant is required to register pursuant to 5 CFR §151.21 and in doing so to apply by submitting a form 678. Submission of the form automatically results in an investigation of the new applicant, 5 CFR §151.23, and a disclosure of any inventory of narcotics dating back to the previous December 31. An applicant on December 30 would thus incriminate himself as to narcotics he possessed with the past twelve months.

In United States v. Covington, 282 Fed.Sup. 886, the doctrine of Marchetti, Grosso and Haynes cases, supra, was extended to the federal statutes §4741, prohibiting the sale of marijuana, 26 USC 474. This statute provides, similarly to 26 USC §4705(a), the statute under which the appellant was convicted, that the transfer of marijuana, without the written order on the form issued in blank, is prohibited. The wording of 26 USC §4742 is thus substantially similar to 26 USC §4705, the primary difference being that 26 USC §4705 deals in narcotics other than marijuana. A further difference appears in that, pursuant to 26 USC §4741 (a)(1) tax on transfer of marijuana to registrants is a flat $1.00 per ounce, or fraction, and pursuant to 26 USC §4741 (a)(2), $100.00 per ounce when the transfer is to a non-registrant. The tax on narcotics other than marijuana is obtained by the sale of the order forms, which cost one cent each.

From the above comparison it is clear that the statutes taxing the transfer of narcotics other than marijuana are not for revenue purposes.

In the Covington case, supra, the court noted at page 889. that the defendant was:

> "Required simply to provide information, unrelated to any records which he may have maintained, there was no 'public aspects' to the information sought, and the requirements here are directed to a 'selective group inherently suspect of criminal activities'."

26 USC §4705 (a), the statute under which appellant was con-

victed, provides as follows:

> "(a) General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

However, the distribution or transfer of narcotics by doctors, dentists, veterinary surgeons and pharmicists and other practitioners, who do so in the course of their professional practice, constitutes an exception. Those in the named professional capacities are specifically exempted from the requirement of submitting the report of the previous month's transfers by the provisions of 26 USC §4705(c)(1) which states as follows:

> "(c) Other exeptions. Nothing contained in this section, section 4735, or section 4774 shall apply --
>
> (1) Use of drugs in professional practice. To the dispensing or distribution of narcotic drugs to a patient by a physician, dentent, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed of distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 4773."

From the foregoing, it is clear that the only transferors of narcotics who are required to report and register are those inher-

ently suspect of criminal activity, since all other transferors are exempted from the statutes provisions.

In Covington, supra, the court further stated at page 889 that it did

> "Not feel it was within its province to engraft immunity restrictions on the tax system in question here. Congress has made it quite clear that disclosure of marihuana transfer tax payments is to be made to prosecuting authorities."

Again, the instant case provides ample similarities, since 26 USC 4705, the statute under which appellant was convicted, clearly provides for the disclosure of incriminating evidence to authorities within one month of a transfer and, furthermore, requires retention of duplicate records for a period of two years. These records require the transferor to pur into writing the date, number of items sold and the name of the purchaser. The purchaser and vendor are forbidden to change the registry and class number or the internal revenue district on the form, 5 Code of Federal Regulations §151.164. The information required and contained in the blank forms is clearly such as to establish whether there has been a violation of 26 USC §4701 (tax on importation, production and sales) or °4721 (registration tax on dispensing activities). It is clear, also, that the same information would be inherently useful to state narcotic enforcement officials.

Required of the transferor is the monthly report and retention of records for two years; and, further, that the

transferor maintain his records open to inspection and provide a certified copy upon demand to any state or federal official charged with the enforcement of narcotic laws, 26 U.S. Code §4773. Inspection by state officials could not be expected to be of significant use in the collection of taxes, since the tax is a federal tax. We are thus, again, brought to the point where the clear intent of Congress in enacting 26 USC §4705(a) was to aid state and federal law enforcement officers with respect to the enforcement of narcotic laws.

It is clear, therefore, that if the appellant complies with §4705(a) and demands, files and retains the required form incident to a transfer of narcotics, he then becomes subject to a real and substantial danger of prosecution for the violation of either state or federal narcotic statutes. Failure to have a registry and class number would be evidence that appellant had not paid the occupation tax required by 26 USC 4721 and would immediately trigger an investigation of the transfer as being one of unregistered and untaxed narcotics.

The most significant of the prohibitory statutes, as they apply to the appellant, are those of the State of California. The California Health and Safety Code §11500, et seq, provides substantial penalties for possession, possession for sale, transportation and supplying of narcotics. Penalties up to life imprisonment are provided. It is obvious that by the information required on the federal transfer form under the provisions of 26

USC 4705(a) and demanded on the form provided for that section, he has immediately exposed himself to either state or federal prosecution, and possibly both. It is clear that appellant could not withhold inspection from either state or federal officials requesting the information, for to do so would violate another statute, 26 USC 4705(d).

The Fifth Amendment to the United States Constitution makes it mandatory that this court follow the reasoning of the Supreme Court in Marchetti, Grosso and Haynes, supra, and find that appellant's claim of the privilege against self-incrimination is a complete bar to a criminal prosecution for the violation of 26 USC §4705(a).

C O N C L U S I O N

In the four previously stated arguments, we have conclusively proved that the District Court committed clear error in not granting appellant's motion for a continuance in order to obtain the presence of an essential material defense witness. Many current authorities were cited to support the proposition that denial of the opportunity to have witnesses appear in his favor is contradictory and repugnant to the provisions of the Sixth Amendment to the United States Constitution.

In addition to the foregoing, it has been conclusively proved that the trial judge constantly interfered with the examination and cross-examination of witnesses and defendant alike and, in so doing, denied the appellant the fair and impartial trial guaranteed by the provisions of the Sixth Amendment.

It was also proved conclusively that the prosecution was permitted to introduce incriminating hearsay statements which implicated appellant in the crime charged; but which hearsay denied appellant the opportunity of confrontation and cross-examination as guaranteed by the Fifth Amendment to the United States Constitution.

It was further proved conclusively that the federal narcotics enforcement statutes relating to transfers, 26 USC §4705(a), the statute under which appellant was convicted, is unconstitutional being violative of the self-incrimination clause of the Fifth Amendment to the United States Constitution.

In view of the foregoing, it is eminently clear that the appellant in this case was denied a fair trial: First, because of the repeated procedural defects, and, second, because of the inherent unconstitutionality of the statute under which the prosecution took place. Accordingly, we reach the inescapable conclusion that on Arguments I, II and III, appellant herein must be accorded a new trial; and on Argument IV, appellant herein must be found not guilty and discharged. This court is urged to remand the matter to the United States District Court for the Northern District of California for disposition in accordance therewith.

Respectfully submitted,

Murray B. Petersen

MURRAY B. PETERSEN, Attorney for Appellant

MURRAY B. PETERSEN
1500 Financial Center Building
Oakland, California 94612

Telephone: 835-8676

Attorney for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

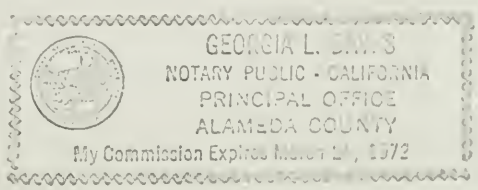
WINSTON BRYANT McCONNEY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22,722 CERTIFICATE OF MAILING

I, MURRAY B. PETERSEN, certify that I am the attorney for appellant in this action, and that I served the foregoing Appellant's Opening Brief on Cecil Poole, attorney for appellee, on March 11th, 1969.

MURRAY B. PETERSEN

Subscribed and sworn to before me, a Notary Public in and for the State of California, County of Alameda, this 11th day of March, 1969.

Georgia L. Davis, Notary Public - State of California
County of Alameda



IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS LEYVA BARRAGAN, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,723
OTILA NAVAIRA-PEREZ, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,724

On Appeal From the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
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JOHN L. AUGUSTINE
Assistant United States Attorney
Attorneys for Appellee

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Assistant United States Attorney
Attorneys for Appellee

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ISSUES OF THE CASE

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2. Did the Court err in denying defendants' Motion for a Judgment of Acquittal?

III.
JURISDICTIONAL STATEMENT OF FACTS

This case was begun in the United States District Court for the District of Arizona by the return of an Indictment by the Federal Grand Jury sitting at Tucson, Arizona, on July 19, 1967. The indictment charged the defendants with having received, concealed and facilitated the transportation and concealment of approximately eleven (11) ounces of marihuana in violation of 21 U.S.C. §176a and without having obtained a permit and without having paid the special tax thereon as required by law in violation of 26 U.S.C. §4744(a).

On July 31, 1967, the defendants failed to appear for their arraignment and a bench warrant was issued for their arrest. On the same date, the bench warrant was quashed and defendants' motion for a continuance was granted.

On November 29, 1967, Count II of the Indictment was dismissed and the case proceeded to trial. On November 30, 1967, the jury returned a verdict of guilty as to both defendants.

On December 26, 1967, defendants' Motion for New Trial was denied and both defendants were sentenced to five years imprisonment. Bail on appeal was fixed at $10,000 for Barragan and $1,000 for Mrs. Perez.

On March 14, 1968, the United States Court of Appeals for the Ninth Circuit granted defendant Barragan's motion to reduce the appeal bond to a $1,000 cash bond with additional security consisting of the unencumbered home of his parents valued at $7,500. Barragan posted the appeal bond on April 19, 1968.

The District Court permitted Mrs. Perez to remain free pending her appeal.

Both defendants were granted leave to appeal in forma pauperis and were provided a transcript of the trial.

The Trial Court had jurisdiction for the trial of the offense by the provisions of 18 U.S.C. Section 3231. This Court has jurisdiction of the appeal by the provisions of 28 U.S.C. Section 1291.

Perez and Barragan have filed separate appeals, but since they were tried together and have raised the same issues, the Government, pursuant to Rule 28(i), Federal Rules of Appellate Procedure, Title 28, U.S.C., is filing one reply brief.

Statement of Facts

Perez and Barragan were first seen at 11:00 p.m. on the 24th of June in a 1959 brown Buick on Canal Street in Nogales, Sonora, Mexico (TR 42). Washington went back to the Grand Avenue Port of Entry and placed a lookout on the vehicle with the inspector on duty. (TR-42) Barragan

and Mrs. Perez were next seen by Agent Washington shortly after midnight on June 25 sitting in the Buick which was parked in front of the El Cubano Bar in Nogales, Sonora, Mexico. (TR-43) Barragan was sitting in the driver's seat and Mrs. Perez was sitting on the passenger side. (TR-43, 44)

At 2:30 a.m. on June 26, 1967, the Buick entered the United States from Mexico and was recognized by Customs Inspector Condez as the vehicle to be on the lookout for. (TR-18, 19) Mrs. Perez was driving the car. (TR-20) Mr. Condez searched the car (TR-21), and Mrs. Perez's purse (TR-33). While searching the car, he saw Mr. Barragan observing the search of the car. (TR-23, 24) from the Mexico side of the border. (TR-28) About 30 seconds to a minute after Mrs. Perez was passed through customs (TR-28), Barragan was searched and allowed to proceed into the United States (TR-30).

While Mrs. Perez's car (TR-204, 205) was being searched Condez had the Customs Agents notified. (TR-21, 22) Agent Washington drove to the port of entry at approximately 2:30 a.m. in the morning. (TR-45) When he arrived he saw the Buick heading north and proceeded to follow it. (TR-45) The Buick stopped at a service station for a minute to a minute and a half and proceeded south. (TR-47). When it came to the Customs compound it made a U-turn and headed north again. (TR-47) The Buick proceeded north for half a mile and made another U-turn and headed south. (TR-47) Washington observed the Buick stop alongside Barragan who was walking on Arroyo Street. (TR-48) Washington drove to the intersection of Arroyo and Grand Avenue where he picked up Agent Cameron and waited for the Buick. (TR-49) Approximately five minutes later the Buick drove by headed north on Grand Avenue. (TR-50) Washington observed three people in the vehicle (TR-50). He followed

the Buick. (TR-50) The Buick proceeded north until it was approximately one and a half miles north of Nogales when it executed a U-turn and headed south on Grand Avenue. (TR-50) Washington did not follow the Buick south but waited in the area where it had made the U-turn. (TR-50) Approximately five or more minutes later the Buick drove by headed north. (TR-51) Washington followed the Buick to Mile Post 14 where it was stopped. (TR-51) Immediately prior to stopping the Buick, Washington turned on his siren and put his lights on high beam. (TR-52) He then observed Barragan, who was in the back seat of the Buick, slide to the right side, or passenger side, of the car. (TR-53) Mrs. Perez was driving the Buick, her daughter, Rita, was sitting on her right and Barragan was in the back seat. (TR-54).

After Washington put his siren and high beams on, he pulled alongside the Buick on the left side. (TR-107) At this time Agent Dennis, who was also following the Buick, moved up close behind it with his high beams on. (TR-107) As the Buick began slowing down, Dennis saw an arm clothed in black come out of the right hand side of the Buick and saw something fly out the window. (TR-107) Barragan was wearing a black suit. (TR-114) Dennis described the object as being approximately two by two by six inches together with what appeared to be a streamer. (TR-108) Dennis stopped his car and searched for the objects. He found a chunk of vegetable substance and a black scarf. (TR-109) The vegetable substance was marijuana. (TR-188). Agent Dennis showed the chunk of vegetable substance and the black scarf to Agent Washington who then placed Barragan, Mrs. Perez, and Rita Perez under arrest. (TR-55)

Barragan was taken to the Customs Agency office where he laid his coat on a desk in order to be fingerprinted. (TR-84, 85) Cameron removed debris from the coat pockets, which was identified as marijuana. (TR-159).

Mrs. Perez testified in her own defense but Barragan did not testify.

IV.
SUMMARY OF ARGUMENT

1. The search of the defendants and Mrs. Perez's automobile when they entered the United States from Mexico did not preclude a subsequent border search approximately one and one-half hours later and fourteen miles from the border.

2. The Court did not err in denying the Defendants' Motion for Judgment of Acquittal.

V.
ARGUMENT

1. The search of the defendants and Mrs. Perez's automobile when they entered the United States from Mexico did not preclude a subsequent border search approximately one and one-half hours later and fourteen miles from the border.

Appellants Perez and Barragan contend that once they entered the United States after having been searched at the border, the protection of the Fourth Amendment attached to them and they could only be stopped for a subsequent search if probable cause existed. Suspects are not always immune from examination by Customs Agents merely because they may momentarily escape detection and pass safely through the first customs check. *Thomas vs. United States,* 372 F.2d 252, 255 (5th Cir. 1967); *United States vs. Rodriguez,* 195

F. Supp. 513, 516 (S.D. Texas, 1960), aff'd, 292 F.2nd 709 (5th Cir. 1961).

In *Thomas vs. United States,* supra, Thomas was stopped and searched in El Paso within a period of one and one-half hours at most, after his return to the United States and within a distance of six blocks from the border. Thomas maintained that his entry into the United States was complete prior to his search and that the search was without probable cause. The Court held that under the circumstances of the case, the examination of Thomas at the border line did not in and of itself preclude further use of a border search. The Court stated that the time, within 1½ hours after Thomas entered the United States, and the distance, six blocks from the border, suggest that the search qualified as a border search. *Thomas vs. United States,* supra, at page 255.

It may be argued that *Thomas* can be distinguished from the present case since Thomas was treated like any tourist when he entered the United States, while Mrs. Perez's automobile and purse were searched when she crossed the border and Barragan was searched when he entered the United States. This would not be a valid distinction since in both cases the defendants were not thoroughly or completely searched when they entered the United States. Only Mrs. Perez's purse was searched and not her person; only Barragan's pockets and ankles were inspected for contraband. Neither defendant was required to remove all their clothing. *Murgia vs. United States,* 285 F.2d 14, 16 (9th Cir. 1960). Neither was a complete inspection made of Mrs. Perez's automobile. The hub caps were not removed, or the door panels removed, nor were the seats taken apart. The search of the automobile can be described as a thorough exterior check.

The fact that in the present case the post-entry search was

made fourteen miles from the border as compared with six blocks in *Thomas* does not affect the search as a border search since border searches have been held to be valid border searches twenty miles from the border. *Rodriguez-Gonzalez vs. United States,* 378 F.2d 256, (9th Cir. 1967).

Nor does the fact that the Perez automobile was not in constant surveillance invalidate the search as a border search. *Alexander vs. United States,* 362 F.2d 379 (9th Cir. 1966), Cert. denied 87 S.Ct. 519.

As was stated in the *Thomas* case at page 254, ". . . there must come a point when a traveler's entry into this country is complete so that the protection of the Fourth Amendment attaches to him." Under the circumstances of the present case, that point was not reached prior to the Custom Agents stopping Mrs. Perez's automobile fourteen miles north of the border. These circumstances are as follows:

(1) After Mrs. Perez left the customs compound, she drove north to a filling station where she stopped for a minute to a minute and a half. She then proceeded south from the filling station to the customs compound where she made a U-turn and proceeded north.

(2) After proceeding north for about one-half mile, she made another U-turn.

(3) Mrs. Perez then stopped the car alongside Barragan. At this time the car was headed south.

(4) To this point, Custom Agent Washington had Mrs. Perez under surveillance from the time she left the compound until she stopped alongside Barragan, at which point he did not follow the car north. About five min-

utes later he observed Mrs. Perez heading north on Grand Avenue. At this time Washington noticed that there were now three people in the car where there had been two previously.

(5) The car proceeded north until it was approximately one and one-half miles north of Nogales, when it again executed a U-turn and headed south on Grand Avenue.

(6) Agent Washington did not follow Mrs. Perez as she drove south but waited in the area of the U-turn.

(7) About five minutes later Mrs. Perez was seen heading north on Grand Avenue. She was followed to a point fourteen miles north of Nogales where her car was stopped.

(8) The foregoing events occurred between the hours of 2:30 a.m. and 3:00 a.m. on June 26, 1967.

(9) Agent Washington had seen Barragan and Mrs. Perez together in Nogales, Sonora on June 24, 1967, (TR-42) and again shortly after midnight on June 25, 1967, in Nogales, Sonora, Mexico. (TR-43).

These circumstances may be considered with the fact that it is common knowledge that large quantities of narcotics are smuggled across the Mexican border daily. *Thomas vs. United States,* supra, page 254, note 4.

2. The Court did not err in denying defendants' Motion for Judgment of Acquittal.

Appellant Perez contends that there was insufficient evidence for the charge against her to go to the jury. A Motion

for Judgment of Acquittal was made at the conclusion of the Government's case and after both sides had rested. (TR-161-243).

In its case in chief, the Government proved that Mrs. Perez was with Barragan on two occasions in Nogales, Sonora, Mexico (TR-42, 43), that Mrs. Perez entered the United States with her daughter in a Buick automobile at approximately 2:30 a.m. (TR-18, 19, 20), that while Mrs. Perez's automobile was being searched Barragan was watching from the Mexico side of the border. (TR-23, 24). About 30 seconds after Mrs. Perez was passed through Customs, Barragan appeared at the port of entry on foot. (TR-30) Mrs. Perez proceeded north from the port of entry, then south, then north, then south again when she picked up Barragan (TR-45, 47, 48). She drove south after picking up Barragan and then headed north for one and one-half miles where it made a U-turn and headed south. It subsequently changed direction and headed north (TR-51). When the Buick was stopped by the customs agents, marijuana and a scarf were thrown from the vehicle by Barragan while the Buick was slowing down. (TR-107, 108, 158). These events, occurring where they did and when they did, were sufficient for the jury to conclude that Mrs. Perez and Barragan were associated in committing the offense charged in the Indictment.

Mrs. Perez testified in her defense. She stated that she drove to Nogales to attend a wedding (TR-201), but only attended the wedding dance (TR-202). She did not remember the last name of the woman who had invited her to her wedding (TR-201). When asked if she knew Barragan before she saw him at the wedding dance she answered, "I was acquainted with him but not for a long time. I hadn't known him." (TR-222, lines 8 through 21). She was at the El Cubano Bar and Lasita with Barragan (TR-224, 225). Bar-

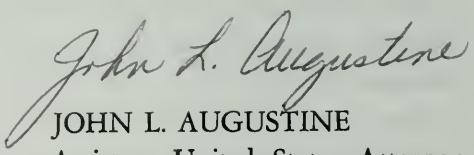
ragan never sat behind the driver's seat (TR-237). She further testified that it was a cold night (TR-235), but that Barragan took his coat off and hung it on a hook in the car (TR-214), where it was when he got out of the car at Mile Post 14 (TR-215). When asked if she made any U-turns after Mr. Barragan got into her car, she said no. (TR-236). Barragan had no suitcase with him when she picked him up to drive him to Phoenix (TR-235). The jury apparently believed the testimony and found the rest of her testimony unbelievable. The Government's case was strengthened by the testimony of Mrs. Perez and the defendants' motion for a judgment of acquittal was properly denied.

VI.
CONCLUSION

Mrs. Perez and Barragan were stopped as part of a lawful border search and arrested as a result of, and only after, evidence which they discarded had been found without a search; and which evidence created probable cause for their arrest.

Respectfully submitted,

EDWARD E. DAVIS
United States Attorney
For the District of Arizona



JOHN L. AUGUSTINE
Assistant United States Attorney
Attorneys for Appellee

Three copies each of Brief for Appellee mailed this 26th day of September, 1968, to:

ANITA LEWIS
2541 North 14th Street
Phoenix, Arizona
Attorney for Appellant Perez

JOSEPH C. RAINERI, SR.
14 North Central Avenue
Phoenix, Arizona 85004
Attorney for Appellant Barragan

No. 22,725

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

MARGARET ELIZABETH CLINE, as surviving wife of ROBERT HERRICK CLINE, Deceased; PLATT CLINE, as Guardian of the Estates of Robert Herrick Cline II and Kelly Michael Cline,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF THE APPELLANT

EDWIN L. WEISL, JR.,
Assistant Attorney General

CARL EARDLEY,
First Assistant, Civil Division

EDWARD E. DAVIS,
United States Attorney

MORTON HOLLANDER,
Attorney,
Department of Justice,
Washington, D. C. 20530.

INDEX

Authorities

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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF THE APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment against the United States arising out of the death of Robert Herrick Cline, the death allegedly having occurred because of the negligence of Federal Government employees. The action was brought under the Federal Tort Claims Act, 28 U.S.C. 1346. Judgment for the appellee was entered on November 1, 1967, and notice of appeal was filed on December 29, 1967. The jurisdiction of this Court to rule upon

the appeal is found in 28 U.S.C. 1291.

STATEMENT OF THE CASE[1/]

Robert Herrick Cline was drowned on September 1, 1965 in Reservoir No. 1 located within the confines of the Navajo Army Depot. This Depot, located in Coconino County, is twelve miles west of Flagstaff, Arizona. The circumstances of his death are as follows: There was a heavy growth of weeds in the bottom of the small[2/] reservoir which, at the point in question here, was 20 feet deep; and in August 1965 the Depot hired the Magna Corporation of California to eradicate the weeds through the use of chemicals. The small boat which was carrying the chemical tanks capsized, and the tanks sank to the bottom of the reservoir. The Depot then decided to employ a diver to locate the tanks. The Provost Marshal of the Depot contacted the Sheriff of the County, who maintained a Search and Rescue Unit, employed, among other things,[3/] to recover the victims of drownings. He advised that his regular diver was not available. However, he recommended Mr. Cline, the man who

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1/ The Statement of Facts follows the District Court's statement in most particulars. However, where additional details are added, or differences appear, the record or transcript citations will be given.

2/ The reservoir is approximately six acres in size. (Harmon Dep. p. 24.)

3/ The major function of the unit was to find hunters and others lost in the mountains or desert.

had actually organized the scuba diving part of the unit (Tr. 107, 141). Of course, Cline's scuba diving was only an avocation He made his living working for a newspaper chain and at the time of his death was advertising manager for the classified section of the Arizona Daily Sun, of which his father was a publisher.

A Depot official contacted Cline, who agreed to take on the job which he estimated would take but a few minutes (Tr. 58) for a flat fee of $25. The conversation was generally limited to answering Cline's questions about the nature of the tanks which were to be located (Tr. 27). The transaction was handled by the Depot as a contract and the District Court properly found that Cline was an independent contractor, not a servant or employee.

The diving operation was originally scheduled for August 31, 1965, but Cline for personal reasons rescheduled it for the next day, and arrived on September 1 at 2:00 p.m. accompanied by his wife and two children. There were also a number of Depot employees on hand to watch the proceedings (such an aquatic operation apparently being a rather novel event, Tr. 93). The Depot did not have any diving equipment and Cline borrowed a wet suit, two oxygen tanks, a face mask and other equipment from the Sheriff. Mr. Patterson, the senior Depot employee involved in this project, instructed the

foreman of the plumbing maintenance section, Mr. Teninty, to have men available to help Cline, and to provide the equipment necessary, and, in particular, a life line (Tr. 28, 32). The life line originally furnished was too heavy in Cline's judgment and he asked for a lighter line which was furnished. (Tr. 35, Teninty Dep. p. 7, Harmon Dep. p. 15.) The length of the line was not established with certainty. The witness handling the rope was McKissick who estimated its length at 50 feet (Tr. 61).[4/]

The Depot's assistance to Cline in the venture consisted of providing two row boats which were lashed together to make up a landing platform from which Cline could operate. One boat was 12 feet and the other 14 feet long and the longer boat had an outboard motor. (Harmon Dep. pp. 12-13.) A photograph of the platform is in evidence as Plaintiffs' Exhibit 2C. The Depot furnished an anchor which was made out of a piece of 4" lead pipe, 14 inches long, and filled with lead. (Tr. 72, Teninty Dep. p. 12.)

4/ But see Tr. 99, Giles Dep. p. 6, Teninty Dep. p. 7. One item of significance but inconclusive proof relates to the oxygen tanks which Cline borrowed from the Sheriff. The Sheriff stated that tests before the dives indicated a supply of 40 to 45 minutes. (Tr. 120-123.) However, see Bosley Tr. 145-147. Cline himself, according to McKissick, stated after his first dive that he had only five or six minutes of air left, Tr. 102, and that when he came up the third and last time he told Giles he was out of air and in trouble (Giles Dep. p. 9). However, the witnesses agreed that bubbles came up for 10 to 20 minutes, establishing that the tank had an air supply. (Tr. 11, Harmon Dep. p. 39.)

The platform was operated by Earl McKissick, Depot employee, a plumber and steamfitter by trade, employed as a water plant operator, who was experienced in handling motor boats (Tr. 74). Also on the platform was Billy Giles, the employee of the Magna Company who had been present when the Magna tanks were lost.

McKissick maneuvered the platform to the general area where the tanks were thought to be located, marked by a plastic bottle. There was a wind blowing. Cline had dressed in his wet suit and while on the platform adjusted the oxygen tank and then made two brief semi-circular passes in the area, returning to the platform each time to rest. After the second pass Cline put on an extra set of weights, and, upon inquiry by Cline, stated that he could get out of the weights by simply pulling a release. (Giles Dep. pp. 7-8.) Despite Patterson's statement to Cline that by Government regulation he had to wear a life line (Tr. 60)[5/] Cline rejected its use although at one point it appeared that he was ready to slip it on. (Tr. 77, 81, 86, Giles Dep. pp. 8, 16-17, Olson Dep. pp. 14, 24.)[6/] According to McKissick, Cline stated that he wanted to be free of the rope while looking for the tanks, and would use the rope

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5/ In fact, there was no such regulation. Patterson apparently assumed that the practice he was familiar with was regulatory. (Tr. 32, 33.)

6/ Whether Cline used the life line at all is not certain, but immaterial since he did not use it on the fatal dive.

once he had found them and started the work of salvage (Tr. 86, Olson Dep. p. 14) and McKissick assumed that Cline knew what he was doing. (Tr. 105.) On the third dive Cline made a fish-hook turn but shortly returned to the surface 25 to 30 feet from the platform, and in trouble. (Tr. 11, Giles Dep. p. 9, Olson Dep. p. 16.) Giles dove into the water and swam to Cline and attempted to hold him up. McKissick brought the platform to within 10 to 15 feet of the two men floundering in the water, and when nearby threw the safety line to them but the wind interfered. (Tr. 52, Harmon Dep. 35, Olson said 25 feet, Dep. 21 He tried again this time throwing his own life jacket, but again the wind interfered. McKissick, while Giles continued to struggle with Cline, brought the platform over to the men but not in time.[7/] Both men sank, and when Giles came to the surface completely exhausted and alone he clung to the boat and later was taken to shore and given artificial respiration and then taken to a hospital. The rescue operation, prior to Cline's final submersion lasted perhaps five or ten minutes. (Harmon Dep. p. 28.)[8/]

7/ A detailed account of the rescue efforts is set forth herein at pages 28-34.

8/ Aragon said "not too long" Dep. p. 14. Teninty said "it seemed like quite a little while" Dep. p. 18. The Court's statement (R. 221) that Giles released Cline "to save himself", and that thereupon Cline "adjusted his mask, inserted

(continued on page 6A)

8/ (continuation)
his mouthpiece and sank" is without credible support. The only witness who could possibly know Giles' motivations was Giles himself. Giles testified that Cline was frantic and kept taking him under, and that the "last thing I remember they just hung me over the side of the boat. . . and took me ashore." (Giles Dep. pp. 9, 11-12). Giles was then given artificial respiration, and taken to a hospital.

Insofar as the unfortunate Cline is concerned, other witnesses observed him dragging Giles under (Aragon Dep. p. 12, Olson Dep. p. 22) and the statement by the District Court implying that Cline matter-of-factly went to his death, after adjusting his mask is negated by the evidence, and by common sense. If Cline was so poised why didn't he release his weights -- why didn't he swim to the boat -- why did he struggle with his rescuer?

Cline's wife and children were watching from the shore, and Mrs. Cline was pleading with the onlookers to go to her husband's rescue. Mr. Patterson entered the water and swam to the point where Cline had submerged but because of cold and exhaustion could not effect a rescue. Subsequently, four other men including McKissick, employees of the Depot, plunged into the cold water and tried diving for Cline but were unable to reach him because of the cold and the weeds. Cline's body was recovered several hours later by dragging. Cline's widow, and Cline's father, the guardian of Cline's two children, filed suit against the United States contending that the Government had been negligent in conducting the diving operation, and that the Government's negligence was responsible for his death. The Government contended that there was no negligence on its part and that in all events Cline had been guilty of contributory negligence. The District Court found for the plaintiffs and awarded them a total of $389,390.15. This appeal followed.

STATUTES INVOLVED

The Federal Tort Claims Act (28 U.S.C. 1346) provides, in part:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

> where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Also see 28 U.S.C. 2674.

SPECIFICATION OF ERROR

1. The District Court in finding that Cline was an amateur scuba diver, and that the Depot was negligent in providing men and equipment to help Cline, and that this negligence caused Cline's death.

2. The District Court erred in finding that the Depot was negligent in attempting the rescue.

3. The District Court erred in finding that Cline was not negligent in the conduct of the maneuvers.

4. The District Court's award was excessive, and its findings re damage do not comply with Rule 52(a), F.R.C.P.

ARGUMENT

Preliminary Statement

The Court has made findings concerning liability, which, if supported by the record, would make this appeal an exercise in futility. But although appellant recognizes the burden placed upon it by Rule 52, F.R.C.P. it is convinced that a careful analysis of the record will disclose that Mr. Cline's death was not due to Government negligence but to his own failure to adhere to fundamental scuba diving safety rules, or, in the alternative, that his death was an accident for which there is no responsibility.

The Court found liability based upon (1) failure of the Depot to provide safe equipment and competent personnel and (2) failure of the Depot personnel as Good Samaritans to adopt reasonably careful rescue tactics and (3) failure of the Depot personnel to exercise without negligence the "last clear chance" to save Mr. Cline.

At the outset we should observe that these three concepts cannot all apply.[9/] Under the Good Samaritan doctrine it is assumed that the rescuer is a "volunteer", and in such a case he owes no duty to the one in trouble to provide adequate equipment or personnel. He is only obliged to use the materials at hand in a reasonably careful manner. Since the Court has found that the Depot neglected its duty to supply competent personnel and adequate equipment, acts and omissions which resulted in Cline's death, there was no reason for the Court to find liability under the Good Samaritan doctrine, other than as a hedge against the rejection by a higher court of the findings of incompetent personnel and inadequate equipment.

Also the "last clear chance" doctrine assumes that a person's own negligence has placed him in danger from which, despite that negligence, he can be extricated by reasonably careful conduct on the part of another. Here too, the rescuer's

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9/ The Court stated that liability was established "on any one or all three bases". (R. 230.)

only responsibility is to use the equipment at hand in a reasonable manner, considering all the circumstances.[10/] The District Court expressly found that Cline was not guilty of any negligence, so again we have an apparent hedge against the possibility of a higher court finding contributory negligence. The District Court's rulings, of course, increase the appellant's burden, but as we expect to demonstrate, the burden is not insuperable.

With this preface, let us examine the findings in some depth.

I

The Finding that the Depot's Negligence Caused Cline's Death is Clearly Erroneous.

The District Court has found that Cline was an inexperienced diver, that his operation was supervised and controlled by the Depot, that the Depot furnished faulty equipment and incompetent tenders to assist him, and that the Depot's negligence in these respects brought about Cline's tragic end. We shall discuss these various conclusions in the order stated.

A. Cline was not an amateur, inexperienced diver, whose operation the Depot undertook to supervise and control.

The Court found (1) that the Depot did not make a thorough inquiry into Cline's qualifications, and (2) that Cline was

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10/ The cases involving the Good Samaritan and Last Clear Chance doctrines are noted infra, pages 25-27.

neither expert nor experienced in scuba diving. (R. 231.) This finding, to appreciate its intended significance, must be considered with the finding that "the Navajo Depot retained or assumed the direction, control and supervision of the recovery operations" (R. 230).

The Court in its opinion does not discuss the significance of these findings, but we presume that the Court is stating that the Depot negligently hired an "amateur" to do a job requiring an expert, instructed the "amateur" how to carry out his function, and that the drowning was caused by the negligence of the Depot in choosing Cline, the "amateur", the inference being that if Cline had been an experienced diver the drowning would not have occurred. We also can infer that it is the Court's conclusion that since Cline was an "amateur" he was not guilty of contributory negligence even though he failed to follow basic safety rules -- since as an "amateur" he couldn't be expected to know what those rules were.

As we shall demonstrate shortly the factual findings are without any credible support -- but first, let us consider the legal implications of these findings. They are without any relevance unless the Court is impliedly finding that the Depot owed a duty to Cline to determine whether he was qualified to perform the job at hand, that the Depot failed to discharge its duty, and that this failure was responsible in whole or in part for Cline's death.

We are unaware of any support for the concept that the Depot had a duty to Cline to protect him from his own incompetence. There was no contractual duty -- the essence of the contract here being merely that for $25 Cline would locate the tanks. This contract carried with it an implied representation by Cline that he was capable of doing the job, but certainly the Depot did not impliedly agree that it would be responsible to him if he lacked the expertise to do the work.

Cline's Experience

With respect to the facts, the appellant does not contend that the Depot "thoroughly" inquired as to Cline's qualifications By that we mean that there is no indication that Depot personnel inquired about his training, his studies, his certificates or the nature and number of his dives. The record does show that Cline was a known member of the scuba diving unit of the Search and Rescue squad of the Sheriff's office (Harmon Dep. pp. 45, 47), and the record does show that Cline was suggested by the Sheriff, and the record does show that in 1962 in the same reservoir Cline had performed some lengthy under water work for the Depot, replacing a valve with the help of a Depot employee named Gonzalez. (Tr. 96, 97, 141, Teninty Dep. p. 14.)[11/] With

11/ The District Court seems to stress this fact implying that the Depot should have made Gonzalez available for the tank recovery (R. 223). But Mr. Patterson did not know Gonzalez was a diver. He was a plumber and steamfitter, who apparently was able to assist Cline in the valve repair, working under 3' of water. He knew something about diving, since he was suited for

(Continued on page 13)

that much established appellant fails to see any significance in the Depot's failure to inquire further into Cline's qualifications.

As to Cline's experience, the finding is only supported by the appellees in this case. Cline's father testified that his son was not an experienced scuba diver, although admitting that his own newspaper published a story to the contrary. The newspaper described young Cline as an "experienced scuba diver who had worked on many rescues in northern Arizona in recent years." (Tr. 174, Dfts. Exh. A.) Furthermore, the elder Cline conceded on cross-examination that he didn't have much knowledge of young Cline's scuba activities (Tr. 176). Cline's wife testified that his experience was limited, and that he had only participated in two search and rescue missions (Tr. 180-181). But this testimony is completely rebutted by disinterested witnesses. The Sheriff testified that Cline represented himself to be an experienced scuba diver; that he consulted Cline about the qualifications of potential members of the unit, that he had the longest period of service of any one in the unit, having organized the unit about eight years before, and that he had been involved in 15 - 20 rescue diving operations (Tr. 107-110,

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11/ (continuation)
the occasion. However, there is no evidence that the presence of Gonzalez would have averted the tragedy. And since Cline knew about Gonzalez, he should have asked for his help if he regarded such help necessary. (Tr. 61, 96-97, Teninty Dep. pp. 4-6).

119). Mr. Shoemaker, a friend of Cline's and member of the rescue unit, testified that Cline had told him that he was a qualified diver and has received training (Tr. 244). Brady, captain of the rescue unit, testified that he considered Cline to be a competent diver (Dep. pp. 4-6). In the face of the testimony of witnesses without any interest in the outcome of the case, and those most likely to know of Cline's qualifications, and considering the newspaper account, we submit that the Court's finding of inexperience is clearly erroneous, and should be disregarded.[12/]

The Depot's Control

Passing now to the issue of control, it is first essential that the relationship of the parties be established, for that relationship will of itself be indicative of the measure of control which existed. The District Court found that Cline was an independent contractor, and this most assuredly was the case (R. 232). It is axiomatic that an independent contractor is responsible for his own safety, and cannot recover damages ordinarily for injuries suffered in the performance of his contract. Dixon v. United States, 296 F. 2d 556 (C.A. 8, 1961); Arizona Binghampton Copper Co. v. Dickson, 195 P. 538 (Ariz.,

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12/ Cline's competence as a swimmer was not challenged (Tr. 175, Olson Dep. p. 19).

1921); Gulf Oil Corp. v. Bivins, 276 F. 2d 753 (C.A. 5, 1960), cert. den. 364 U.S. 835. Similarly, a landlord is not responsibl for injuries to an invitee caused by dangers which are readily apparent. He is only liable for failing to warn of latent or hidden dangers. Clinton Foods, Inc. v. Youngs, 266 F. 2d 116 (C.A. 8, 1959); United States v. Trubow, 214 F. 2d 192 (C.A. 9, 1954). However, where an employer retains control over some aspect of the contract work he is liable for injuries sustained as the result of negligence in exercising such control. Welker v. Kennecott Copper Co., 403 P. 2d 330 (Ariz., 1965).

In the instant case the undenied facts are that the Depot personnel were not familiar with scuba diving[13/] and the hazards connected therewith, whereas Cline was. The further fact is that the Depot personnel had no diving equipment and made no effort to control the diving operation other than to advise Cline that he should wear a safety line, Mr. Patterson, senior representative of the Depot, being under the mistaken impression that this was a regulation. (Tr. 32, 33, 36, 37, 58, 60, 129, 131, Harmon Dep. p. 14, Olson Dep. pp. 10, 11.) Giles was not a Government employee, and was in the platform for the sole purpose of helping find the tanks, and advise concerning their salvage.

13/ Patterson had had some experience with repair of wharfs, bumper and fender logs. (Tr. 32.)

McKissick was a Depot employee familiar with handling of small boats. Neither Giles nor McKissick had any knowledge of scuba diving, and the only suggestion made by either to Cline was to repeat earlier instructions that he wear the safety line, a suggestion which was rejected. (Tr. 74, 81, 82, 90, 100, 101.) In short, Cline was hired as an expert, and was given a completely free hand. In the simple language of McKissick, "I thought he knowed what he was doing." (Tr. 82.) And if the Depot was in control, then it appears that Cline refused to follow directions, and that this refusal cost him his life.[14/]

14/ The District Court seems to assume that the Depot was under some legal obligation to be familiar with and to apply the safety rules with regard to scuba diving as stated by the Navy Diving Manual, and to be informed about the water rescue measures suggested in the American Red Cross Manual. The rule is that employers (and landowners) must take whatever precautions are reasonably required to protect invitees. They are not insurers. Dixon v. United States, supra, Montgomery Ward v. Lamberson, 144 F. 2d 97 (C.A. 9, 1944). We don't believe it is realistic to hold that Depot personnel in Arizona should be versed in Navy Diving techniques, or in the refinements of water rescue suggested by the Red Cross. We submit that in this pond, used as a water supply, and for some boating, the Depot regulations requiring the use of life preservers by boaters was all that could be reasonably required. The Depot could not be expected to know about the problems connected with scuba diving. The Depot plainly was dependent on Cline's expertise; and it is a reasonable conclusion from the record that only Cline could be expected to know the basic safety rules of scuba diving.

B. The Depot was not negligent in furnishing men and equipment to assist Cline.

The District Court has found that the Government was negligent in the following particulars: (R. 232.)

1. In supplying an inadequate unsafe platform.

2. In supplying an inadequate safety line and life jackets.

3. In failing to supply a ring buoy or a knotted or weighted safety line.

4. In supplying an inadequate motor for the platform.

5. In supplying incompetent tenders.

6. In failing to follow reasonable rescue measures.

These acts of negligence are presumably the basis for the Court's finding of liability -- although the Court has not explicitly detailed the single act or omission on which it pegs liability. Therefore, defendant must examine each of the fact findings.

The Equipment

The Court's findings with regard to the equipment might be defensible if this accident had happened on the high seas, and the ship was not equipped with customary life saving equipment. There are many cases in which the courts have held ship's personnel to a high degree of skill in effecting rescue operation And the District Court appears to have placed some reliance on

these cases, having cited Kirincich v. Standard Dredging Co., 15/ 112 F. 2d 163 (C.A. 3, 1940).

But this diving operation did not take place on the high seas, where expertise by ship personnel is obligatory. It took place in Arizona, near Flagstaff, and specifically in what would normally be called a large pond. The Depot people involved were not knowledgeable about scuba diving. Cline was the only one present who was familiar with the equipment and the hazards. Cline saw the equipment being offered, and only made one complaint. He said that the first safety line provided was too big or too rough, and the Depot then supplied

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15/ See fn. 23 infra p. 37. In the Kirincich case the Court quoted from Harris v. Penn. Ry. Co., 50 F. 2d 866, 867 (C.A. 4, 1930) as follows:

> There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete as in that of a sailor upon a vessel at sea. . . If he is taken sick or is injured on board ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew. By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land. From time immemorial seamen have been called the "wards of admiralty"; and in this country as elsewhere the legislature has enacted an elaborate system of legislation for their protection.

another line. But the motor, the platform, the life jackets were there for him to judge and if they were inadequate or presented any hazard -- he was the only one who could have pointed this out. If he voiced no concern it must be assumed that he was willing to take whatever risk existed. And he made no objection with good reason. There was, in fact, nothing, wrong with the equipment.

The Platform

First, let us take stock of the platform. It is used as a base from which the diver operates. He departs from it, returns to it, rests in it, and it contains whatever equipment and personnel he may need. A platform may or may not be maneuverable. It may be a pier, a float, or a large ship -- or a small vessel.[16/] There is nothing in the record to suggest that one is negligent if one selects a platform which is not capable of easy maneuverability. It may not move at all. And it is not normally expected that a platform will be used to pick up divers. The diver goes to the platform, and not the platform to the diver. The platform used here (see Plf. Exh. 2C) was sufficient for normal purposes. It took the diver

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16/ The only evidence in the record relating to the make-up of a platform is found in the Navy Diving Manual which lists repair ships, salvage vessels, submarine rescue ships, diving barges or floats, shore based diving units, or "suitable small craft". Plf. Exh. 14, p. 86.

to the area to be searched. It gave him a place to rest, and housed his equipment. Although cumbersome and difficult to turn (Tr. 75), it was maneuverable despite the wind for twice it approached Cline in the abortive rescue effort, and on the third run it picked up Giles. If there was a problem, then, it was not with the platform.

The motor was an (4, 7 or 9 horsepower) Evinrude,[17/] was capable of pushing the platform to the area to be searched, and to propel the platform during the rescue efforts. The fact is that in the space of a few minutes (Marshall Tr. 12) McKissick brought the platform on one or more occasions to the critical area, although on each occasion he had to stop the motor, make his throw, then re-start the motor, and maneuver the boats back into position for another attempt. And, as we shall point out later (pp.38-39), the diver's safety is not dependent upon the platform but upon other factors.

The Safety Line

With respect to the inadequacy of the safety line, we conclude that the findings in subparagraphs d and e (R. 232) must be read together:

> d. The emergency equipment provided by the contractee (the safety line and life jackets) were inadequate.
>
> e. No ring buoy, nor weighted nor knotted safety lines were provided by the contractee.

17/ Teninty Dep. p. 13, Patterson Dep. p. 34, McKissick Dep. p. 74.

We construe this to mean that the Depot had a duty to furnish a weighted or knotted safety line or a ring buoy. The Court no doubt has concluded that had the safety line furnished by the Depot been weighted McKissick would have had better luck throwing it to the two men in the water. This is undeniable (although a weighted line might have struck and dazed one of the men), but we believe that the Court has overlooked the fact that a safety line in a diving operation is not intended to be thrown to a diver. He is supposed to tie it to his body, so that he can be pulled to safety in the event of trouble. The Court is really saying that since Cline rejected the normal use of a safety line McKissick should have anticipated that Cline might get into trouble, and should have anticipated that he would have a problem throwing the line to Cline without a weighted end, and should, therefore, have attached a weight. To state the proposition is to answer it. The only one in the operation who could have foreseen such an emergency was Cline -- and he said nothing about the need for a weighted line.

Insofar as a ring buoy is concerned there is no evidence whatsoever to support the finding that failure to furnish the boat with a ring buoy was negligent. The only testimony was that a ring buoy was not provided, and that after the accident

ring buoys were placed around the pond. (Teninty Dep. p. 18.)[18/] The fact is that this pond was not a swimming area, it was filled with weeds and chemicals, and surrounded by barbed wire. (Plfs. Exhs. 2A, 2G.) It was used for boating and the Depot regulations in effect with respect to water hazards required boaters to wear life preservers. (Plfs. Exh. 2F.)[19/] In view of these unchallenged facts certainly ring buoys were unnecessary. The question remains as to whether the employment of a scuba diver required a reasonably prudent employer to foresee that a ring buoy might be necessary.

Again we reiterate at the risk of tedium that this accident occurred in dry country where there is little sophistication about scuba diving and its hazards, and if any one could

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18/ In view of the facts, appellant is at a loss to understand why the Depot placed the buoys there. But we can surmise that fearful management, mindful of the insinuations of counsel in this case, out of sheer nerves, ordered the buoys.

19/ We believe that the Court's finding re the weighted line is based upon its examination of Plaintiffs' Exhibit 15, the American Red Cross Manual, in which a knotted life line is shown on page 191. This line is thrown from the shore and has a range of 35-40 feet, see page 39. It is evident that such a safety line is a substitute for a ring buoy -- an article which is standard equipment for pools and bathing beaches, and is also carried by sea going vessels. (See page 40.) With respect to this article it is stated "The ring buoy now in use, other than on ships, is distinctly a throwing apparatus and requires a special technique and skill for successful use." It is most effective between 45-60 feet. (Page 92.)

or should have foreseen the need for a ring buoy it was Cline himself. A property owner has no duty to foresee and provide for every contingency of which the mind of man can conceive. He is only expected to provide for such hazards as can reasonably be anticipated. On this pond who could anticipate that the diver would not use a safety line provided; that a wind would interfere with the throwing of a rope and a life preserver to a diver; that an experienced diver with air in the tank would sink to his death with no effort to swim to safety etc. etc.

Furthermore, we believe it to be mere conjecture that Cline would have been saved had a ring buoy or knotted rope been available. Giles was not only struggling to save Cline -- he was struggling to save himself. He may or he may not have been able to grab a rope or ring buoy, had one been placed within his immediate grasp. The fact is that the safety rope did fall close to him, but he couldn't disengage himself from Cline in time to grab it. And as the Court has noted McKissick threw in his own life preserver -- but Giles never was able to reach that -- didn't, in fact, even know that it had been thrown. (Giles Dep., p. 20.) Finally, assuming that a rope had reached and been grasped by Giles -- what assurance is there that this would have saved Cline? Cline was in a panic, and Giles was exhausted. A rope or buoy in the hands of Giles wouldn't have prevented either or both of them from submerging.

The "Tenders"

There is no contention that either McKissick or Giles was skilled or even semi-skilled in the art of tending to the needs of divers. McKissick took care of the water plant at the Depot, and Giles was a salesman for the Magna Company. But Cline knew this. No one made any representation to him that the two men were skilled tenders. McKissick went along to maneuver the platform. Giles was there to help locate the tanks, and to give advice as to their handling once found. Again, since only Cline had the experience necessary to determine the qualifications of a tender, it was up to him to assert his needs, or to be deemed to have acquiesced in the risk.

However, there is no evidence or any suggestion by the Court that either the equipment or the tenders caused Cline any trouble until the tragic moment when he rose to the surface calling for help, and the rescue efforts commenced. Then the question arises as to whether inadequate equipment or inexperienced tenders, or both, caused his death. Although the District Court has not given a very strong indication of the specific acts or omissions which it believed responsible for the accidental drowning, it seems very clear that the negligence, if any, occurred during the rescue efforts, and defendant accordingly surmises that the findings of the District Court relating to the rescue effort are the really significant findings. The Court found (R. 233):

> In the attempt at rescue the Depot was negligent in
>
> a. That McKissick failed to maneuver the platform so that it approached Cline from the windward side.
>
> b. That the Army failed to provide a ring buoy, an adequate safety line or other adequate life saving equipment.

First, it should be noted that the specificity concerns (1) the alleged <u>active</u> negligence of McKissick in maneuvering the platform, and (2) the negative act of negligence or omission in failing to furnish the "tenders" with a ring buoy or an adequate safety line (meaning a weighted line). With these observations in mind, let us now consider in detail the rescue effort.

II

The Rescue Operation Was Not Negligently Performed

The Ring Buoy

The District Court's finding that a ring buoy or "adequate" safety line should have been provided has already been considered. However, we should point out that this omission is not relevant to either the Good Samaritan or Last Clear Chance doctrine relied upon by the District Court. For under both doctrines the rescuer's liability only exists for negligent handling of the tools at hand. The Good Samaritan is not liable for failing to provide proper equipment or for the faulty condition of the available equipment, even though its unsatisfactory condition may have been due to the prior negligence of the rescuer. Anderson v. Bingham & Garfield Ry. Co., 214 P. 2d 607 (Utah, 1950); Restatement of Law of Torts, Section 479(c), 47 Yale Law Journal 704; Frank v. United States, 250 F. 2d 178 (C.A. 3, 1957), cert. den. 356 U.S. 952; Owl Drug Co. v. Crandall, 80 P. 2d 952 (Ariz., 1938). In other words, if the Depot personnel were volunteers the condition of the platform, motor, safety line, lack of ring buoys, etc. was of no legal significance. The liability would only exist for negligent handling of such equipment as was available.

The same principle applies to the Last Clear Chance doctrine. See the Restatement of Law, Torts, Section 479:

> A plaintiff who has negligently subjected himself to a risk of harm from defendants subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, . . the defendant is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff. (Emphasis supplied.)

Thus, as under the Good Samaritan rule, if the defendant lacks the means to effect a rescue due to the defective nature of his equipment, he cannot be held. Anderson v. Bingham & Garfield Ry. Co., 214 P. 2d 607 (Utah, 1950). Also see 4 Arizona Law Review 72, 77.

In all events we can, in the present posture of the case, pass by the Good Samaritan doctrine for the Court has failed to find that as a result of the Government's alleged negligence Cline's position was worsened. Such a finding is essential, if the Good Samaritan concept is the basis of liability. United States v. DeVane, 306 F. 2d 182 (C.A. 5, 1962).

This case is unlike United States v. Lawter, 219 F. 2d 559, cited by the District Court, where a helicopter effecting a sea rescue negligently dropped the victim, causing her death. Prior to the rescue effort she had been standing in four feet of water, and in no immediate peril -- hence, as the Court noted the attempted rescue left her in a worse condition than she would have been in, had the rescue been not attempted.

Here, Cline was obviously in immediate danger of drowning; and without the rescue efforts there is no evidence and no reason

to believe he would have been saved. The only persons who could have helped were on shore -- and their efforts did fail. In brief, what could anyone on shore do that Giles did not?[20/]

Then the major issue remaining is whether the failure of McKissick to approach Cline from the windward side was the negligent act which resulted in Cline's death. Before undertaking to examine this critical finding it will be helpful to review the testimony with regard to the rescue efforts. Although in a time of high excitement it is improbable that witnesses will remember the details exactly the same way, the rescue story can be pieced together with reasonable accuracy.

There was a wind blowing from south to north which created ripples or waves on the water. (Tr. 47, 54, Aragon Dep. p. 8, Olson Dep. pp. 11, 12.) The wind was strong enough to push the boat downwind when the motor was off. (Tr. 51, 52, 75.) When Giles surfaced the third time, in distress, he was upwind of the boat. The two men involved in the action, McKissick and Giles (not a Government employee), had this to say, paraphrased:

McKissick

When Cline came up he was hollering for help. He was 20-25 feet from the boat. Giles jumped in the water. I threw the

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20/ The Court below noted that McKissick, Patterson and Aragon tried to rescue Cline -- but it failed to record that also two other Depot employees, Schmidt and Garcia, jumped into the water and tried to save Cline. (Harmon Dep. pp. 38-39; Tr. 12.)

safety line and my own life preserver to Cline, but neither reached him because of the wind. Then I started the motor on the boat, after pulling up the anchor, and the boats were slow. I was told that the safety line had become tangled with the propeller. By the time I got the boat turned around and headed back to Cline, Cline had disappeared. I proceeded to the spot where there were bubbles, and picked up Giles. Then I saw Patterson enter the water and swim out from the shore. I also picked up Patterson. I cut the motor off when I picked up Giles and Patterson. I took Giles and Patterson to the shore -- picked up Aragon, and took him back to the bubbles. Then I dove in. Then I took the boat to the shore, tired and hurt, went to the chlorination plant to warm up -- and to the doctor the next day for an injury (never described). I have had sleepless nights wondering about what I should have done that I didn't -- whether it would have been better to jump overboard also -- I don't know. (Tr. 87-96, 98, 104.)

Giles

After the first pass Cline rested in the boat for about five minutes, said that he was low on air -- said he didn't want to use the other tank because it was low too. After his second pass Cline returned to the boat -- said he needed more weights. He put the weights on himself -- said that there was a release to enable him to drop them off quickly. He re-entered the water,

came up in a few minutes, 25-30 feet from the boat, said that he was out of air -- needed air. I told McKissick to bring the boat over -- then dove in and swam over to Cline. Cline was frantic -- kept fighting me, trying to stay up. I told Cline to release the weights, but Cline did not respond -- kept up his struggle. I tried to release the weights myself but Cline kept pulling me under. I hollered to McKissick to hurry up with the boat as I couldn't last much longer. I also hollered to the people on the shore to help. McKissick hollered that the rope was hung in the propeller.

After McKissick freed the propeller he brought the boat "close", and then threw a line, but it fell six feet short. I told Cline to let go, so I could get the rope but Cline hung on, and by the time I managed to free myself the boat had drifted away. I then returned to hold Cline up. McKissick then brought the boat to me, but by that time Cline had gone under. McKissick took me to shore -- and I was then taken to the base hospital. The over-all event may have taken 8 to 10 minutes. Cline pulled me under about 3 or 4 times. (Dep. pp. 7-12, 19-23.)

Witnesses on the shore varied these accounts in some particulars:

Patterson

McKissick, when the emergency began, started the boat, swung it around, and threw a line. I am not very certain of

the distance but estimate that the boat was 10-15 feet from the two men when McKissick threw the rope into the wind. He started the engine again, repeated the maneuver once or twice. The wind blew the boat north. I jumped into the water after removing much of my clothing and swam out, took the line to the spot where Cline had gone down. I didn't have enough slack in the line to dive, and the boat was drifting away. I think the distance between me and the boat was about 50 feet. I became exhausted and couldn't get into the boat without help. (Tr. 50-56.)

Harmon

When Cline surfaced and hollered to the boys in the boat Giles swam to him, and McKissick started up the motor, brought the boat within 10-15 feet of the men, threw a line to them, after cutting off the motor. The boat then drifted away, McKissick restarted the motor, repeated the operation -- maybe once or twice more. But the boys failed or were unable to grasp the rope -- I don't know whether the rope was short, or to the right or left. Cline, I think, was about 125 feet from the bank. The motor didn't give any unusual trouble -- although McKissick may have been a little nervous. I don't know why McKissick didn't take the boat right up to the two men except for fear of hitting them. I don't know whether Cline was fighting Giles. Several other men made an effort to rescue Cline. One was a Mr. Schmidt, another was Mr. Garcia, and Mr. Aragon -- and then Patterson and McKissick. All were Government employees. (Dep. pp. 27-39.)

Aragon

When Cline surfaced and needed help McKissick threw the rope, which hit Cline but he couldn't get hold of it. Then Giles jumped in and swam to him. Cline grabbed Giles' legs, and was pulling him down, and then McKissick, I think, started the motor, and twice more threw the line when he was pretty close to them. Then I swam out and tried to dive for Cline, after he sank, but was unable to do anything because of the cold water and weeds. Then I went to the hospital, was given coffee and went home. (Dep. pp. 12-15.)

Teninty

Cline surfaced about 15 feet from the boat. Giles jumped into the water in his clothes and life jacket. McKissick started the motor, but the anchor rope got caught in the propeller, and the motor stopped and the boat drifted away. McKissick tried to throw the life line to Cline and Giles but couldn't hit the mark, the breeze blowing the rope back, and I imagine that he was excited. McKissick got the motor started and went back and picked up Giles, who was being pulled under by Cline -- but finally worked himself free. Patterson jumped into the water, and I left to try and start up the weed cutter -- but couldn't start it. When I came back Patterson and Giles were stretched out and were being given artificial respiration. (Dep. pp. 15-19.)

Olson

When Cline surfaced the critical time McKissick started the motor and moved to Cline, and then the motor died, and the boat drifted away and then Giles jumped in to hold Cline up. Although Cline was an expert swimmer he made no attempt at all to swim -- appeared to be helpless. McKissick had trouble with the boat but he maneuvered it over there and threw a rope but Giles had his hands full with Bob (Cline) and the rope either didn't reach him or he didn't see it. So then McKissick tried again with another rope. I guess that when McKissick threw the rope he was about 25 feet from the two men. It seemed to me that the boat was close enough when he threw the rope. Then McKissick moved the boat right to them but both Giles and Cline had gone beneath the surface, and when Giles came up he grabbed the side of the boat completely exhausted. I was about 50-75 feet from where the drowning took place. (Tr. 15-22.)

Marshall

When Cline surfaced 30 feet from the boat McKissick raised the anchor and the boat started drifting away from Cline. Giles dove in and swam to Cline who clutched him for two minutes. McKissick frantically tried to start the engine and after several tries succeeded. He got in the general vicinity of Cline and Giles, stopped the engine, threw a rope -- it fell short and the boat drifted away. McKissick again started the engine, and

again approached the two men, who went under water for brief periods. Again a rope thrown by McKissick failed to reach them. As the boat drifted away Cline sank and Giles swam toward the boat, and clung to the side completely exhausted. McKissick took Giles to the shore, and then brought back Mr. Schmidt who put on the face mask of Cline and tried to dive for him. Patterson, Patrolman Garcia, Aragon and McKissick all made attempts to rescue Cline. I estimate that the air bubbles lasted 10-12 minutes. Patterson and Giles were completely exhausted and received medical attention. (Tr. 11-12.)

Margaret Cline

When my husband bobbed up he told the man in the boat that he was in trouble. Giles swam to Bob. McKissick tried to start the motor, then threw a rope which fell short. Then he started the motor, turned it around, and threw another rope which fell short, and again the boat drifted back. Then Giles yelled that he couldn't hold on much longer, and then Bob looked at me, and went below the surface. The man in the boat was having difficulties When no one went to his rescue I kicked off my shoes and got into the water up to my knees. Bob was still on the surface. Then Patterson raced by, swam out -- became exhausted and they had to pick him up. But for 8-10 minutes while Bob was on the surface no one entered the water. Bob was quite calm in the water. (Tr. 194-199.)

* * * * *

From the record it is clear that when Cline surfaced in trouble, the platform was downwind, that McKissick turned the boat and came directly toward Giles and Cline, stopping 10-15 feet short each time to throw the rope and the life jacket. The defendant concedes that had McKissick maneuvered the boat the long way around -- that is so as to approach the men from the windward side, he might have had less trouble hitting Giles with the rope or jacket. At least that is the necessary assumption on which the Court bases its finding of negligence and causation. But now let us consider the circumstances. Cline surfaced in distress. Giles plunged into the cold water (43 degrees - Tr. 98) to help Cline. What was the reasonable reaction for a man in McKissick's position? The anchor was down. The motor wasn't going. Due to the wind the boat was facing away from Cline and Giles. McKissick had to either pull up the anchor (or it may have been cut by the propeller), start the motor, turn the boat around, and try and pick up the two men struggling in the water. Under these circumstances was it reasonable for the Court to find that McKissick was negligent in failing to approach the two men from the opposite side? This is the real issue in the case. The District Court did not reproach McKissick for not bringing the boat directly to the two men, possibly recognizing the hazard, but it did find that he should have recognized that the wind would interfere with his

heaving of the line and jacket, and that this would result in Cline's death. Appellant submits that McKissick's action of proceeding by the shortest route to the men in the water was reasonable, and that he should not be charged with Cline's death because he failed to realize that Giles could not leave Cline to get the rope or jacket -- which apparently came within a few feet of Giles, but which Giles could not seize because he was too occupied trying to keep Cline afloat. The fact is that McKissick in his desperation to save the two men did not think about upwind or downwind and candidly so stated. (Tr. 96.)[21/] He had had no experience in this area.

The American Red Cross Life Saving and Water Safety Manual (Plf. Exh. 15) is a book of instructions, some pertaining to

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21/ Although McKissick's motivations in stopping the platform, and throwing the line and preserver, before reaching the two men in the water, are not clear -- in fact this decision was sensible for the rather obvious reason that the boat might have struck and injured one or both men, or one or both might have been cut by the rotating propeller. The Red Cross Manual (Plf. Exh. 15) points out (p. 200) that motor boat rescue is hazardous because of the "relatively high speeds at which even the smallest of these operate," and because of the "unguarded propeller operating at high speed". In connection with the operation of the platform in this instance it should not be forgotten that McKissick was alone. He had to operate the boat, lift the anchor, move the boat into position, cut off the motor, get the rope or life preserver, heave it and when the wind moved the boat away, he had to start the motor, maneuver again into position, stop the motor, throw the rope etc. That McKissick in view of the ultimate tragedy might have been more effective had he maneuvered the boat much closer -- taking what risks there were of blows or cuts, is good hindsight. But how was McKissick to know that Cline would disappear within a matter of minutes after he surfaced?

the rescue of drowning persons. The manual advises that when a rescuer is in a boat and is about to attempt the rescue of a drowning person he should, "if it can be remembered" bring the rescue boat on the upwind side of the victim before he dives in so that the craft will drift down within reach of the rescuer when he returns to the surface (p. 196). If persons instructed in such techniques are not always expected to remember this fine point in rescue work, how could McKissick be reasonably expected to prepare for such an emergency.

In an emergency situation, particularly where the rescuers are untrained and almost certain to be laboring under a great strain, the law does not require the same calm rational behavior that can be expected under non-stress circumstances. Baltimore and Ohio Ry. Co. v. Postom, 177 F. 2d 53 (D.C.A., 1949);[22/] Page v. United States, 105 F. Supp. 99 (E.D. La., 1952). In the latter case involving a futile effort by the Coast Guard to rescue a private sloop, the Court said:

> Negligence is the failure to exercise ordinary and reasonable care in the circumstances proved. In appraising the acts of

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22/ In the Baltimore and Ohio RR Co. v. Postom case the Court said, p. 56, "The law makes allowances for the fact that when confronted with a sudden emergency and an immediate peril, some people do not think rapidly or clearly and failure to do so does not constitute negligence as a matter of law."

> the Coast Guard personnel, therefore, it is not enough to sit here in the comfort of our chambers, slide rule in hand, and decide what should have been done. The only way to determine negligence or lack thereof in this case is to place ourselves, in our mind's eye, on the bouncing bow of a 38-footer in squall-ridden Lake Pontchartrain with the wind and sea from the north and the concrete seawall a few feet to the south, and then decide whether or not the acts of the Coast Guard personnel in the circumstances of this case evidenced a lack of ordinary and reasonable care. Paraphrasing the words of the great Greek soldier, Paulus, in addressing the citizenry, some of whom had been complaining of the conduct of the war in Macedonia and offering suggestions as to how it might be better fought: "Let the armchair strategists come with me to Macedonia."

In sum, it is only necessary to establish that the rescuer make reasonable efforts, and be not guilty of affirmative negligence.[23/] Johnson v. United States, 74 F. 2d 703 (C.A. 2, 1935); Cvelich v. Erie Railroad Co., 27 Atl. 2d 616 (N.J., 1942), aff. 29 A. 2d 869.

23/ There are many cases wherein owners of vessels have been found derelict in rescue efforts of seamen or passengers overboard, due to lack of proper equipment or lack of training of crew members. Most of these cases arise under the Jones Act which holds the owner liable for the slightest degree of negligence, due to the hazardous nature of the work, the contract requirements between ship and seamen, and the protection which has from time immemorial been afforded the wards of the admiralty. See Kirincich v. Standard Dredging Co., 112 F. 2d 163 (C.A. 3, 1940); Sadler v. Penn. Ry. Co., 159 F. 2d 784 (C.A. 4, 1947); Harris v. Penn. Ry. Co., 50 F. 2d 866 (C.A. 4, 1931); The G. W. Glenn, 4 F. Supp. 727 (Del., 1933); Grantham v. Quinn Menhaden Fisheries, 344 F. 2d 590 (C.A. 4, 1965); Socony Vacuum v. Smith, 305 U.S. 424 (1939); and Bochantin v. Inland Waterways Corp., 96 F. Supp. 234 (E.D. Mo., 1951); Tompkins v. Pilots Association, 32 F. Supp. 439 (E.D. Pa., 1940).

III

The Tragedy Was Due to Cline's Negligence

The Last Clear Chance doctrine is based upon the circumstance of Cline placing himself in danger by his own negligence. Here, the Court has specifically found that Cline was not negligent (possibly because of his "amateur" status), hence, the Last Clear Chance doctrine is not applicable. However, experienced or not Cline represented himself to be a diver, and he should be held accountable, if he failed to follow standard safety rules for divers, and this precipitated the fatal accident. The record here unequivocally shows that Cline did disregard fundamental safety rules for scuba divers, as follows:

A. Cline should have worn the safety line.

A safety line was available. Cline was pressed by Depot personnel to wear it, but refused.[24/] He plainly felt that it would be a hindrance while he was swimming around looking for the tanks. The importance of a safety line, to a diver, cannot be magnified. The Navy Diving Manual which appellees proffered says (p. 23):

> Use the buddy system even for surface tended divers if at all possible. When the situation dictates that a single diver must make a surface tended dive without a buddy adhere to the following rules:

24/ See Tr. 32, 33, 60, 77, 81, 86, 105, Teninty Dep. p. 13, Giles Dep. pp. 8, 16, 17, Harmon Dep. p. 14, Olson Dep. pp. 10, 11, 14, 24.

a) Secure the tending line around some part of the diver's body (the waist is best).

Cline himself when working in the same pond a few years earlier had refused to work without a safety line, even though he had another man with him (Tr. 135) and he told his wife that it was customary to wear a line any time you are in the water. (Tr. 203.) Another member of the Search and Rescue unit stated the common rule -- if you are diving alone, that is without another diver, you wear a safety line (Tr. 238). Certainly, Cline, an experienced diver knew why a safety line was important -- knew that his life was imperilled without it -- and we submit that his failure to use the line, was negligence. And assuredly the lack of a safety line contributed to his tragic end. One would be hard put to say that a man who leaped from an airplane without a parachute was not guilty of negligence. This is very much the same type of situation.

The District Court in finding that Cline was not negligent in failing to use the safety line relied upon the testimony of a Mr. Van Zandt, a trained scuba diver who stated that in weeds a diver would be handicapped if he made <u>circular</u> passes, since the rope would wind around the weeds, and tire the diver (Tr. 224). In the first place there was no need for Cline to make circular passes in searching for the tanks; and in the second place he didn't make such passes. The District Court found that he made <u>semi-circular</u> passes (R. 220), and the witness most

specific on this point testified that Cline on his first pass went to the west of the platform, on the second pass to the southwest, and on the final pass to the south, making a sort of fishhook turn. (Olson Dep. pp. 14-16.) In the light of the record there is basis for concluding that Cline's rejection of the safety line was justified. It was sheer risk taking.

B. Certainly if a safety line were impractical Cline should not have made his dives without another diver present.

Cline was the only person at the site with knowledge concerning scuba diving and the hazards connected therewith, and it was incumbent upon him to follow the rules which are expected to provide safety during such operations. One such rule is -- don't dive without a buddy diver. (Plfs. Exh. 16, pp. 4, 7.)[25/] Cline told his wife that diving alone was "against everything in

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25/ The Navy Diving Manual states (p. 85):

> Any thorough preparations for diving operation must include provisions for a standby diver or swim buddy depending upon the type of diving apparatus employed. In an operation employing surface supplied diving equipment a stand by diver must be designated. This diver will be dressed to the extent that he can be put into the water almost immediately to go to the aid of the distressed diver. . . The important thing is to visualize an emergency and see if you can get help to the diver in time to be of material assistance.
>
> When self contained diving equipment is being used, the buddy system is a must. There has never been a recorded case of accidental drowning when this system is being used.

scuba diving". (Tr. 201.) Even the appellees' expert, Van Zandt, conceded that the tender should also be a diver, and that he would refuse to dive without a buddy diver. (Tr. 218, 219, 230.) And Mr. Thrailkill, a scuba diver in the same unit as Cline, stated that one positive rule is -- never dive alone. (Tr. 238.) Another member of the Search and Rescue unit testified that the unit held safety meetings once a month, and that it was a rule that dives were not to be made without another diver standing by in case of emergency. (Tr. 245.) The reason for this is plain enough, at least to the diving fraternity. Another diver is familiar with the hazards, with the equipment. He is trained to handle emergencies. He is able to go under water to rescue a trapped or helpless fellow diver. And certainly without a buddy diver present the least Cline should have done for his own protection was to wear a safety line, so that in the event of trouble he could be pulled to safety.

Cline's negligence bars recovery. Campbell v. English, 110 P. 2d 219; Young v. Campbell, 177 P. 19 (Arizona).

IV

The Award of $389,390.15 is Not Supported by Special Findings as Required by Rule 52(a), F.R.C.P., and is Excessive.

With respect to the issue of damage the District Court found, as follows (R. 231-232):

1. Cline was an employee of Hagadone Newspapers, a division of Scripps-Lee Newspaper Publishers, and

was in an executive training program.

2. Cline had a life expectancy of 42.16 years.

3. Cline's average earnings over his life expectancy would be $24,000 per vear.

4. The present value of $6,000 per year for 42.16 years equals $121,684.42.

5. The present value of $24,000 for 42.16 years equals $486,737.68.

6. Twenty per cent for the cost of maintenance of the decedent over the stated period would be $97,347.53.

Based upon these findings the Court entered judgment for ppellees in the sum total of $389,390.15 ($486,737.68 less 97,347.53).

The issues presented with respect to these findings are:

1. Whether they comply with the specificity requirements of Rule 52(a), F.R.C.P.

2. Whether the District Court's failure to deduct from projected gross earnings any amount for income tax was error as a matter of law.

3. Whether the award is excessive.

A. The Findings do not meet the requirements of Rule 52(a) with respect to specificity.

Under Rule 52(a) of the Federal Rules of Civil Procedure, he trial court in non-jury actions, like those brought under he Federal Tort Claims Act, "shall find the facts specially

and state separately its conclusions of law thereon . . ." (emphasis added). The mandate of the Rule is unequivocal, and, consequently, the duty of the district court plain. As has been established in countless decisions, the function of a district court, in an action tried without a jury, is to indicate the essential, subsidiary findings of fact leading to its ultimate conclusions of fact or law. E.g., Kelley v. Everglades District, 319 U.S. 415, 420 (1942); Kweskin v. Finkelstein, 223 F. 2d 677 (C.A. 7, 1955); Maher v. Hendrickson, 188 F. 2d 700 (C.A. 7, 1951); Desch v. United States, 186 F. 2d 623 (C.A. 7, 1951); Dearborn Nat. Casualty Co. v. Consumers Petroleum Co., 164 F. 2d 332 (C.A. 7, 1947).

In Dalehite v. United States, 346 U.S. 15, 24 (1952), fn. 8, the Supreme Court observed in another Tort Claims Act case that "statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied . . . . Otherwise their findings are useless for appellate purposes". While this emphasis on the adequacy of findings for appellate review has been made by every court interpreting the purposes of Rule 52(a), that emphasis has not been restricted to the question of whether the specificity of findings is sufficient to allow the appellate tribunal to make an intelligent appraisal of the bases for the district court's decision. As observed by the Eighth Circuit in Michener v. United States, 177 F. 2d 422 (C.A. 8), there is also implicit

the vital purpose of sparing the appellate court the necessity of searching the record in order to supply findings of fact for the trial judge, a function, in any event, for which an appellate tribunal is unsuited.

These considerations are as appropriate to the question of damages as to that of liability. Rule 52(a), of course, draws no distinction between the two, and its requirement, in express terms, is equally applicable to both. And the courts have long recognized the need for particularization of the factual bases for damage awards. Thus, in another recent Tort Claims Act case, the Supreme Court held that "it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed." Hatahley v. United States, 351 U.S. 173, 182 (1956).

It is true that some Courts of Appeals have not held the District Court to specifity with regard to damages. See, e.g., Sanders v. Leech, 158 F. 2d 486 (C.A. 5, 1946); United States v. Pendergrast, 241 F. 2d 687 (C.A. 4, 1957). But these decisions fail to adhere to the express mandate of specificity in Rule 52(a), nullify the purposes behind the Rule's broad requirement, and are in conflict with the recent pronouncement of the Supreme Court in Hatahley v. United States, supra. Moreover, the rule of specificity has been accepted by many other recent Court of Appeals decisions. See e.g., Major Appliance Co. v. Gibson

Refrigerator Sales Corp., 254 F. 2d 497, 502 (C.A. 5, 1958); O'Connor v. United States, 251 F. 2d 939, 943 (C.A. 2, 1958); United States v. Rife Construction Co. & Assoc., 233 F. 2d 789, 790 (C.A. 5, 1956); National Popsicle Corp. v. Icyclair, 119 F. 2d 799 (C.A. 9, 1941); S. S. Silberblatt, Inc. v. United States, 353 F. 2d 545 (C.A. 5, 1965).

In the Ninth Circuit this Court has repeatedly ruled that findings of fact must be sufficiently detailed to enable the appellate court to determine the grounds upon which the trial court based its decision. National Lead Co. v. Western Lead Products Co., 291 F. 2d 447 (1961); Dale Benz Inc. Contractors v. American Casualty Co., 303 F. 2d 80 (1962). This Court said Irish v. United States, 225 F. 2d 3, 8 (1955): Under Rule 52(a) the "findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision . . ."

The District Court's ultimate conclusion that Cline would have earned an average of $24,000 a year over his life time, which is the basis for the amount of the judgment entered by the District Court, is not supported by any evidentiary findings of any description other than the fact that he was in a corporate training program. With such a bare unsupported conclusion before it how can this Court effectively review the finding? There is not even a hint as to the District Court's basis for its ultimate conclusion.

Even were this Court of a mind to search the record for support, it would be a fruitless effort. There is no method of establishing the formula used by the District Court. The admitted fact is that Cline was making $7,800 per annum at the time of his death. There is also testimony by a newspaper associate of Cline's father, a plaintiff herein, that it was their goal that young Cline would "ultimately" take over his father's job as publisher of the Arizona Daily Sun. (Tr. 150.) Young Cline was classified advertising manager of the Sun, but was slated to go to Coeur D'Alene, Idaho to become assistant advertising manager. This was a promotion, and he would get $9,000 to $10,000. In three to five years if he continued to make progress he could become a publisher at $17,000 a year, and in two or three years he could make $20,000 or more. And with "a number of years under his belt . . . he should progress up to the $30,000 range." The salary of the publisher (Cline's father) is pretty close to $30,000.

A reading of young Mr. Hagadone's testimony (he was in his early thirties) will reveal how uncertain this time and progress schedule was.

Appellant recognizes that the District Court could have accepted, and probably did, every speculation young Mr. Hagadone proffered; but the appellant and this Court is entitled to know how, on the basis of this testimony, the Court concluded that

the average salary of Mr. Cline would have been $24,000 per year.[26/] Otherwise, Rule 52(a) is without any teeth.[27/]

B. The District Court committed error in failing to make a deduction from gross earnings for federal income taxes.

It would be idle to pretend that the Court's failure to take federal income taxes into account is without judicial support. This particular problem has plagued many courts for years -- and the results have been less than harmonious, although as this Court will note the modern trend appears to require an income tax deduction.

The Second Circuit has had occasion to rule on this issue, on numerous occasions, and some of its decisions have been frequently cited by other courts. Hence, a brief resume of the principal cases there decided may be helpful.

In 1944 in Stokes v. United Airlines, 144 F. 2d 82, the Court had before it the claim of an injured seaman, and the Court said, "We see no error in the refusal to make a deduction for income taxes in the estimate of libelant's expected earnings;

26/ Whether a high school graduate, who appears to have dropped out of college after a few months, and who graduated 82nd in a class of 150 when attending a Navy school for seamen would qualify to publish a newspaper, and would rise quickly to such a position, is subject to some doubt. (Tr. 165, Plfs. Exh. 12.)

27/ On the subject of unsupported conclusions re damages see O'Connor v. United States, supra.

such deductions are too conjectural." (Emphasis supplied.) This reasoning has been followed in many jurisdictions (see 63 ALR 2d 1393, and Federal Income Tax Consequences of Tort Recovery, Intramural Law Review of March, 1968). But in 1959 the same Circuit came to a different conclusion in O'Connor v. United States, 269 F. 2d 578. However, in the following year the celebrated case of McWeeney v. New York, New Haven, Hartford RR Co., 282 F. 2d 34 was decided. There a railroad brakeman earning about $4,800 per annum was injured. He was a bachelor, age 36, and the question came up as to whether allowances for future lost earnings should be reduced by the estimated income tax. The Court said (p. 38) "There may be cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result; but these are at the opposite end of the income spectrum from McWeeney's. For example, if a plaintiff or a plaintiff's decedent, had potential earnings of $100,000 a year, more than half of which would have been consumed by income taxes, an award of damages based on gross earnings would be plainly excessive even after taking full account of the countervailing factors we have mentioned. We find it hard to believe that juries would render such a verdict even in the absence of instruction; but in this limited class of cases the court may properly give some charge or, perhaps better, use the

tools provided by Fed. R. Civ. Proc. 49, and an excessive verdict may always be set aside. In such cases, which in proportion are relatively few, the criticism that the whole process of computation is unrealistic has a considerable measure of validity . . . Such cases are in sharp contrast to the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and, for the reasons indicated, plaintiff is almost certain to be under compensated for loss of earning power in any event." In short, the Court held that income taxes would not be taken into account if the earnings of the injured person or decedent were "not clearly above the middle reach of the income scale." The Court left few hints as to what would be considered above "the middle income" scale. Chief Judge Lumbard wrote a vigorous dissent, joined by Judge Moore.

The McWeeney ruling has been adhered to by the Second Circuit. In Montellier v. United States, 315 F. 2d 180 (1963) earnings of $12,000 a year were held not to be above the middle reach of the income scale. In Cunningham v. Redieret Vindeggen A.S., 333 F. 2d 308 (1964) the Court reversed a district court because in calculating damages in a case involving the death of a seaman the lower court reduced the amount awarded by estimating income tax liabilities. Judge Moore sharply dissented. In

LeRoy v. Sabena Belgian World Airlines, 344 F. 2d 266 (1965) the Court said with respect to an average projected income of $16,000 per year "Certainly the risk that the federal and New York governments will cease to take a substantial portion of a $16,000 income is one of the smaller uncertainties involved in the computations in this case, and the 15% estimate of Judge Murphy is a reasonable estimate of what the portion would probably be." In Petition of Marina Mercante Nicaraguense S.A., 364 F. 2d 118 (1966), cert. denied 385 U.S. 1005, the Court found that earnings of $16,000 and $25,000 were sufficiently high to require income taxes to be taken into account.

Other Circuits do not follow a consistent pattern. The First Circuit recently had before it the death of a railroad employee making a modest wage of about $9,200 per year. The Court ruled out evidence of income tax, following the Stokes case in the Second Circuit. Boston and Maine Ry. Co. v. Talbert, 360 F. 2d 286 (1966). The Eighth Circuit reached a similar result. Chicago & N. W. Ry. Co. v. Curl, 178 F. 2d 497 (1949).

The Seventh Circuit required an income tax deduction in a case involving a projected income of $15,000 to $20,000, stating "This is a case where the impact of the income tax has a significant and substantial effect on the computation of probable future contributions and may not be ignored. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and probable future earnings, nevertheless,

an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before." Cox v. Northwest Airlines, 379 F. 2d 893, 896 (1967). Also see Wetherbee v. Elgin, Joliet and Eastern Ry. Co., 191 F. 2d 302 (C.A. 7, 1951), cert. denied 346 U.S. 867 and 928.

In a case in the Tenth Circuit a flight engineer and co-pilot were lost in an air crash accident. One earned about $10,000 a year and the other about $11,000 -- although the Court found that shortly the co-pilot would have been earning $22,500 per year. The Court upheld the action of the District Court in making a deduction for income taxes, United States v. Sommers, 351 F. 2d 354 (1965), stating "No doubt the income available to survivors would be after income taxes are withheld. However, there is little agreement to be found in the reported cases regarding the application of possible income tax liability to damage awards based upon the prospective earnings of a deceased or injured person. (Citing the Montellier, McWeeney and O'Connor cases) . . . When dealing with such an imprecise and speculative subject the best that can be hoped for is reasonableness . . . In this case it seems that the court reached a fair and adequate result by using the best method it could devise to fit the situation. We cannot say that the result was anything but reasonable."

In this (Ninth) Circuit the issue has been before the Court on several occasions. In Southern Pacific Ry. Co. v. Guthrie, 180 F. 2d 295 (1951), the jury awarded the plaintiff $100,000 for injuries sustained which caused lost earnings as well as pain and suffering. The plaintiff argued that the rule in the Stokes case should be followed, with no deduction from gross earnings for federal income tax. This Court in response said (p. 302), "We think, however, that for the expected period of Guthrie's life, he would have found taxes fully as certain as his prospect of continued earnings." However, the Court ruled that the award was not so excessive as to constitute a denial of a motion for a new trial an abuse of discretion. On rehearing en banc, reported at 186 F. 2d 926, cert. denied 341 U.S. 904, the Court again adhered to the proposition that the actual loss was "net take home pay" (p. 927), but stated that it could not determine what that figure was, and also stated that "we find nothing to show that the court . . . ignored the income tax deductions" (p. 932). The judgment was affirmed.

In 1963 in Nollenberger, et al. v. United Airlines, Inc., 216 F. Supp. 734 (C.D. Calif., 1963) the District Court allowed an income tax deduction. This decision was not reversed on appeal. See 335 F. 2d 379, c. dis. 379 U.S. 951. It is worth noting that both the Sommers case mentioned above, and the Nollenberger case arose out of the same air crash in the vicinity

of Las Vegas, Nevada. The applicable Nevada statute (N.R.S. 1958, Section 41.090) provided for "such damages, pecuniary and exemplary, as shall be deemed fair and just". And both the Ninth and Tenth Circuits permitted income tax deductions under this statute. In the more recent case of Furumizo v. United States, 381 F.2d 965 (1965) this Court affirmed a District Court ruling that under the Hawaiian law requiring "fair and just" compensation the so-called "minority rule . . . is the more modern and reasonable one (which) holds that such estimated taxes should be deducted from the total estimated loss of earnings." There, the decedent had earnings of approximately $6,500 per year.

This brings us to another recent case, United States v. Becker, 378 F.2d 319 (Arizona, 1967) which appears to arrive at a contrary conclusion, and which appellant must overcome. In that case the decedent was a passenger in an airplane engaged in scouting a forest fire. The Court ruled that the pilot was a Government employee and awarded the plaintiff $322,955, finding that Becker's income would have been "at least" $15,000 per year. In regard to the matter at issue the Court very briefly stated "The indications are that under the law of Arizona the incident of income tax has no part in arriving at a damage award. See Mitchell v. Emblade, 298 P.2d 1034, 1037, adhered to in 301 P.2d 1032, and cases cited therein."

In the Mitchell case the issue was whether the District Court in instructing the jury should explicitly point out that

damages for medical pain and suffering were not subject to income taxes. The Supreme Court of Arizona, in accordance with the majority rule in this country, held that such an instruction would be improper. Appellant does not challenge this rule. Such an instruction could be interpreted by a jury as a suggestion by the Court that the damage verdict should be reduced somewhat.

But that fact situation does not confront this Court. Here (as in the Becker case) the issue is whether in determining the income lost to a family by reason of the death of the breadwinner the Court should take into account the income taxes which the decedent would have had to pay, had he lived and earned the amount determined by the Court, in this case $24,000 per annum. Under Arizona law damages in a wrongful death case is to be "fair and just", and the Arizona Supreme Court has determined that the verdict is to be limited to "probable accumulations". Andersen v. Binghampton and Garfield Ry. Co., supra. There can be no doubt that the salary earned by Cline would have been subject to significant income taxes, and that the entire gross earnings would not have been "accumulated" for the benefit of himself or his family.

When this Court in the Becker case used the language, "The indications are" etc. it seems reasonable to conclude that this Court was not free from doubt as to the significance of the Mitchell decision; and we respectfully urge the Court to re-examine the Mitchell case, particularly in the light of its later

Furumizo decision. Arizona law provides for damages which are "fair and just" (A.R.S. 12.613). Hawaiian law calls for "fair and just" compensation (R.L.H. 1955, Section 246-2). Nevada law also provides for damages which are fair and just. Despite the evident similarity of the statutes this Court appears to have reached inconsistent conclusions as to their intendment. Of course, the appellant concedes that local courts may construe similar statutes differently, but appellant submits that in the absence of rather solid proof that such contrary interpretations have been reached, this Court should make every reasonable effort to give similar meanings to similar language.[28/]

28/ The most recent case on the subject of which appellant is aware is Nancy Brooks v. United States, 273 F. Supp. 619 (S.C., 1967). There Judge Russell made an exhaustive review of the cases and other authorities, and stated (p. 628):

> The argument in favor of the (income tax) deduction is compelling. The beneficiaries of an action such as this are only entitled to recover the amount of their actual loss. If the deceased had lived, his future earnings would have been subject to income taxes and the amount available for those entitled to support from him would have been after taxes. However, damages awarded for wrongful death, so far as they encompass prospective earnings, are non-taxable. Unless such damages take income taxes into consideration, the beneficiaries will accordingly be receiving more than they would have had the deceased lived. Accordingly, 2 Harper and James, The Law of Torts, Section 25.12 sums the matter up: "The argument for computing damages on estimated income after taxes is a clear one; this will measure the actual loss. If plaintiff gets, in tax free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost."

(continued on page 56)

This issue is constantly recurring and is of manifest importance. Defendant believes that reason and justice call upon the courts to take a realistic approach to the issue of damages -- and to accept the obvious fact, especially in cases involving large earnings, that income taxes would take a large bite from the projected earnings. To fail to give effect to this fact is to work an injustice to defendants in tort cases.

28/ (continuation)
However in footnote 17, p. 31, he said: "The majority view seems to be against deductibility (Annotation, 63 A.L.R. 2d 1393) but the "modern trend" appears definitely in the opposite direction. Furumizo v. United States (D.C. Hawaii, 1965) 245 F. Supp. 981, 1014."

Judge Russell finding no definitive pronouncement on the subject by the Supreme Court of South Carolina, concluded (p. 632):

> Free thus to follow the commands of reasonable justice, I am of the opinion that the arguments for considering such income tax consequences in a death case (as distinguished from a personal injury case) are so logical and compelling, especially in a non jury case, that a reasonable deduction from prospective earnings on account of income taxes should be made in this case.

Appellant also notes that the Arizona statute mentioned above calls for fair and just damages "having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default." (Emphasis supplied.) In this case appellant believes that even if the District Court were correct in finding some fault with the Depot's rescue efforts, the undeniable fact is that there was no wilful fault -- each man concerned did the best he could to save young Cline, and these circumstances, appellant submits, are "mitigating". In any event, appellant submits that the findings of the District Court should have indicated whether the Court took into account this express statutory mandate.

In view of the deficiencies noted, if this Court should find Depot negligence which caused Cline's death, we submit that the matter of damages should be remanded to the District Court for further consideration.

C. In view of the above, the award, appellant submits, is grossly excessive.

CONCLUSION

Cline, a scuba diver, having elected not to use a safety line, came to the surface in great distress. Several men made every effort to save his life. In the process, Cline, who was frantic, did not, despite Giles' plea, release the heavy weights around his middle, and Cline kept pulling Giles under. McKissick

on two or more occasions brought the boat close to the two men, and threw a rope which fell a few feet short or to one side of Giles. Giles was unable to reach the rope due to his efforts to help Cline stay afloat, and minutes after the tragedy commenced Cline drowned. To hold the Depot responsible for this tragic accident is manifestly unfair. The drowning was due chiefly to the lack of a safety rope on Cline, in violation of the basic rules of scuba diving, and insofar as the Depot is concerned, the drowning was an accident for which it should not be held accountable.

We have every sympathy for the widow and her children, but we believe it to have been egregious error for the District Court to have made a public record that Depot personnel were responsible for Cline's death.

Appellant respectfully submits the decision of the District Court should be reversed, or in any event, the case should be remanded to the District Court for appropriate special findings as to damage.

EDWIN L. WEISL, JR.,
Assistant Attorney General

CARL EARDLEY,
First Assistant, Civil Division

Edward E. Davis,
United States Attorney

Morton Hollander,
Attorney,
Department of Justice,
Washington, D. C. 20530.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Carl Eardley

CARL EARDLEY
First Assistant
Civil Division

AFFIDAVIT OF SERVICE

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

CARL EARDLEY, being duly sworn, deposes and says:

That on July 17, 1968, he caused three copies of the foregoing Brief of the Appellant to be served by air mail, postage prepaid, upon counsel for appellees:

H. K. Mangum, Esquire
Mangum, Christensen & Wall
201 Arizona Bank Building
P. O. Box 10
Flagstaff, Arizona 86001

Carl Eardley
CARL EARDLEY
First Assistant, Civil Division

Department of Justice
Washington, D. C. 20530

Subscribed and sworn to before me
this 17th day of July, 1968.

Audrey Anne Crump
Audrey Anne Crump
Notary Public

My Commission expires August 31, 1971.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,	)	
vs.	)	No. 22725
MARGARET ELIZABETH CLINE, as surviving wife of ROBERT HERRICK CLINE, Deceased; PLATT CLINE, as Guardian of the Estates of Robert Herrick Cline II and Kelly Michael Cline, Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLEES' ANSWERING BRIEF

MANGUM, WALL AND STOOPS
201 Arizona Bank Building
Flagstaff, Arizona 86001
Attorneys for Appellees

IN THE
UNITED STATES COURT OF APPEALS
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MANGUM, WALL AND STOOPS
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Flagstaff, Arizona 86001
Attorneys for Appellees

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ENCYCLOPEDIAS

STATE STATUTES

FEDERAL STATUTES

JURISDICTIONAL STATEMENT

The Appellees concur with the jurisdictional statement of the Appellant.

STATEMENT OF THE CASE

The Appellant states that its Statement of Facts "follows the District Court's statement in most particulars". Appellant then declares that where additional details are given the record or transcript citation will be indicated. The Appellant then goes into great detail in re-trying the case as to the facts, and in many instances interjects its view of what the facts are without giving any evidentiary support for these statements.

Instead of restating the facts of this case again, the Appellees have determined to stand upon the Statement of Facts as set forth by the District Court and the Opinion which was rendered

pursuant to the Statement of Facts. Appellees will contradict the Statement of the Case of the Appellant only in those particulars where its Statement is grossly contradictory to the findings of the Court and is not substantiated by the weight of the evidence.

The Appellant refers to a "small boat which was carrying the chemical tanks" (page 2 of Appellant's Brief). In fact, the equipment which was used to carry the chemical tanks out initially, was not a boat, but was a "float" (Tr. 21) which was used as a weed-cutter (Tr. 67). This was the apparatus which capsized, causing the chemical tanks to go to the bottom of the pond and necessitating the use of a diver to recover them. The Trial Court correctly identified this equipment and described it as a "float or raft" rather than a "boat" (R. 217).

The Appellant refers, in note numbered 3 at

page 2 of its Brief, to the "major function" of the Search and Rescue Unit. Appellees could find no reference in the record to this "major function" and feel that the Appellant did not refer to the transcript to support this additional detail or difference from the District Court's statement of facts.

The Appellant states that Cline agreed to undertake the job "for a flat fee of $25". The testimony of the Depot employees who talked with Cline (Tr. 58 and 143) is that the $25 was an estimate, with the final figure to be determined by the length of time involved in the recovery.

Appellant states at page 3 that the Depot handled the transaction with Cline as a contract, but does not indicate upon what testimony this allegation is based.

The recovery operation was alleged to be "an acquatic operation apparently being a rather novel

event" (Appellant's Brief page 3). The Transcript reference indicates that there were 45-50 people there, some of them being spectators. The District Court indicates (R. 221) that "there was on the shore a retinue of supervisory personnel, spectators and Mrs. Cline and her two small children." Not all of the persons on shore were spectators and the Appellant does not support its statement that this operation was such a novel event.

Appellant states that Cline asked for a lighter line (page 4). This assertion is refuted by the record. In fact, Teninty was not close enough to Harmon and Cline to overhear their conversation. All he knew was that he was told to get another rope and assumed that it was at Cline's request (Teninty Dep. p. 7). Harmon (pages 14-15 Harmon Dep.) states that he decided the rope originally provided was too heavy and sent for a

smaller one. He further states that Cline did not ask for the rope in Teninty's hearing. Both Harmon and Teninty (Harmon Dep. p. 16, Teninty Dep. p. 9) state that the rope was between 30 and 40 feet in length.

The Appellant mentions at page 4 that the Depot provided the two boats, the motor and the anchor. The Depot also furnished the safety line, the life jackets and the persons who were to assist Cline. (Tr. 45, Harmon Dep. pp. 11-18).

The testimony of McKissick was that he had had experience with motor boats, as is stated by Appellant at page 5. McKissick goes on, though, (Tr. 75) to state that he had definitely not had any experience in operating two boats lashed together and that the steering was "quite a bit different" from his previous experience. His previous experience was with fishing boats.

Appellant omits from its Statement of Facts

a matter which both Appellees and the Trial Court felt was worthy of mention; namely, that after the raft left the dock and before the diving operation could commence, the raft had to return to shore in order to secure additional anchoring. The anchor originally used was insufficient to hold the raft in place and additional weights had to be used. (R. 220, Tr. 84).

Appellant's Brief states that there was no regulation requiring the use of a lifeline, and states that "Patterson apparently assumed that the practice he was familiar with was regulatory." (page 5 of Appellant's Brief). In fact, reading the Transcript reference cited by Appellant indicates that Patterson had been ordered the day before to be sure that Cline had a lifeline. There was no assumption on the part of Patterson--he had received specific instructions. (Tr. 32-34; Tr. 60; Olson Dep. pp. 10-11).

Appellant's Statement of Facts implies that McKissick threw the safety line to the two men who were in the water and then threw his life jacket, and that the wind interfered and that was the extent of McKissick's actions. Instead, as stated in the Statement of Facts of the Court, each time McKissick threw something toward the men in the water the boat was drifting rapidly away from them, necessitating restarting the motor, turning the clumsy craft around into the wind and making another approach toward the men in the water. This procedure took place three times, with McKissick always approaching them into the wind, never learning his lesson that the wind was blowing so hard that he could not throw something to them into the wind. (R. 221; Harmon Dep. pp. 27-29, 38, 31-36; Tenınty Dep. pp. 16-17; Tr. 195-196, 50-53; Olson Dep. pp. 20-22).

Appellant does not cite any authority in the

record for its statement, at page 6, that "Both men sank, and when Giles came to the surface completely exhausted and alone ...". This is contradictory to the Court's statement that "Giles released Cline". (R. 221). In its footnote at the end of the paragraph, the Appellant argues that the Court's statement "is without credible support". Mrs. Cline testified (Tr. 195-196) "... And then I looked back at Rob [Cline] and Mr. Giles. And Rob put his mouthpiece in and looked at me. And then he went below the surface of the water."

Teninty in his deposition at page 19 indicates that Giles had to turn Cline loose in order to save himself. Patterson testified that Giles "said that he couldn't last any longer, or words to this effect, and he let go of Mr. Cline and started towards the boat." (Tr. 53). Mrs. Cline testified that "And Mr. Giles said that he yelled to Mr.

McKissick that he couldn't hold on any longer." (Tr. 195-196). Giles' deposition (p. 11) concurs with Mrs. Cline's statement. Also Harmon (Dep. p. 37) indicates that Giles left Cline in order to save himself. These accounts do not indicate that Giles and Cline both went underneath the surface of the water with Giles coming back up alone as is stated by the Appellant. Giles (Dep. p. 23) states that:

> "Q. After you returned to Mr. Cline did Mr. McKissick then bring the boat back up toward you again?
>
> A. It was after Mr. Cline had gone under. He had disappeared."

There is testimony to the effect that the two men in the water were going under from time to time. There is testimony from Giles that Cline was "frantic", but there is other evidence from persons on the bank who were probably not as excited as Giles was that Cline was fairly calm.

Patterson testified:

"Q You say that Mr. Giles came back to the boat. What happened with Mr. Cline?

"A He just put his hands up and settled out of sight." (Tr. 54)

In his Deposition, Olson stated:

"... here's a man that's an expert swimmer, but made no attempt at all to swim. I --

"Q Did he appear to you to be helpless in the water?

"A Yes, and I -- it's unexplainable to me." (page 19)

Harmon's Deposition reflects:

"Q Was Mr. Cline fighting with Mr. Giles, did you notice?

"A Well, not that I could tell from where I were." (pages 36-37)

Having heard this other testimony, and after reading the depositions which were introduced into evidence, the Trial Court was justified in

determining that Cline "matter-of-factly went to his death". Contrary to the statement of the Appellant, this could have occurred, and it is not "negated by the evidence", as is stated by the Appellant at page 6A of its Brief.

ARGUMENT

I.

THE DEPOT WAS NEGLIGENT

A. Cline Was An Amateur Scuba Diver

In its first Specification of Error, the Appellant states that the District Court erred in finding that Cline was an amateur scuba diver (page 8 of Appellant's Brief). The Appellant argues its premise that he was experienced at pages 10-14 of its Brief.

The expert witness on scuba diving, William Van Zandt, testified (Tr. 215-216) that 24 hours

of pool and lecture time is the minimum before an individual is certified as being "competent to get involved in underwater activities as a scuba diver".

Mrs. Cline testified that Cline had not attended classes, either individually or with the Sheriff's Search and Rescue Unit. (Tr. 181-183).

The testimony of the Sheriff indicates that no inquiry was made into the background of persons who might come to the Sheriff and volunteer for the scuba unit of the Search and Rescue group. The Sheriff testified that he never saw any certificates of qualification regarding Cline's diving competence (Tr. 114); when the group was organized the only investigation into Cline's background by the Sheriff was asking Cline if he was experienced (Tr. 108); the Sheriff testified that the group has "a regular monthly scheduled meeting" but no mention was made anywhere in the

testimony of any training or practice meetings, or meetings to examine the qualifications of divers or prospective divers. Mr. Thrailkill, who was the Sheriff's "regular diver" (Tr. 141) testified that he held scuba diving certificates and that his acquaintance with Cline was "I had just discussed with him a couple of times about diving." (Tr. 237-238). Apparently even though Cline had been the member with the longest service in the unit he was not called upon to do much diving for the unit since the "regular" diver had not dived with Cline; this is particularly material since the unit would contain only three to four men at a time, and they were instructed to dive only in pairs. (Tr. 244, 245, 110).

The Appellant points out the testimony wherein persons stated that Mr. Cline told them that he was an "experienced" diver. Of course we have no opportunity to establish that Cline never told

them that. The Sheriff decided that if Cline told him he was experienced he must be; the Depot decided that if someone dived in the Sheriff's Search and Rescue Unit he must be experienced, without inquiring whether there were any qualifications established for membership in that Unit. No one testified as to any testing or examination of qualifications or credentials prior to membership in the Search and Rescue Unit.

Plaintiffs' Exhibit 16 in evidence contains a listing of certain minimum inquiries which should be made by a person who is hiring a diver. These standards include never hiring an amateur (a person who has usually made only a few dives), never hiring an applicant who cannot produce a certificate indicating that he has training in scuba diving, never hiring someone who cannot prove a physical examination within the last year, and sooner if his physical condition is in question.

Mr. Bosley testified (Tr. 127) that publications of the National Safety Council (Exhibit 16 being such a publication) were applicable to the Depot operations.

The Sheriff, as stated by the Appellant, did testify that the deceased had made 15-20 dives. Mr. Shoemaker, though stating that he knew Cline through the Search and Rescue Unit and that his recollection of the substance of a conversation with Cline was that Cline was qualified, does not testify as to any dives which Cline might have made (Tr. 244); Thrailkill, the "regular" diver of the Unit, had not made any dives with Cline (Tr. 238); Brady at page 6 of his deposition does state that he considered Cline to be "a competent diver", but on page 5 of that deposition he states that he is no expert in judging the competence of a scuba diver.

None of these supposedly impartial witnesses

were qualified to pass upon the diving qualifications of Cline. Only one of them was a diver and he had never dived with Cline. The ones who had seen Cline dive had no real knowledge of diving and would not be presumed to know enough about diving to determine whether or not Cline was qualified. The only statement which points to any extensive diving by Cline is the Sheriff's statement of 15-20 dives which Cline had made. Cline's wife and father contradict this. No mention is made of extensive diving by Cline by any of the men who worked with the Scuba unit of the Search and Rescue Unit.

Further, the Appellant alleges that the Appellees must be bound by a statement in the newspaper of which Mr. Cline's father was publisher, to the effect that Cline was an "experienced scuba diver".

The senior Mr. Cline explained that he had

not seen the article until after its publication and that he had not provided the facts contained in the article except for giving biographical data to the writer of the newspaper account. (Tr. 175). Mr. Cline testified at page 161 that Robert was his only child. Appellees submit that the senior Cline's testimony that he did not write or review the article relating to his son's death for the reason that he didn't go to the office for a couple of days, is credible and that the fact that the senior Mr. Cline was publisher of the newspaper does not import truth to its every statement.

In light of the conflicting testimony, and the fact that the persons, whom Appellant says are "those most likely to know of Cline's qualifications", had no experience or particular knowledge which would make them competent to judge Cline's experience or competence, Appellees submit that the District Court's finding of Cline's

inexperience was based upon credible testimony and cannot be determined to be clearly erroneous.

B. The Depot Was Negligent In Providing Men And Equipment

The Appellant concurs with the District Court in determining that Cline was an independent contractor and that the duties of the contractee to the contractor are determinative of the issue. As is indicated by the Appellant the control which the contractee exercises over the contractor indicates the liability of the contractee to the contractor for injuries sustained by the contractor.

At R. 227 the District Court states that the Depot, according to the record, had control of the diving platform; the motor; the anchor, anchor line and safety line; the life preservers; and the personnel.

1. The Diving Platform

Patterson talked with Cline, set a time for the dive, and then called Teninty and ordered Teninty to have men available to assist Cline, and to provide equipment to assist him. (Tr. 27-28, 70-71; Harmon Dep. 13; Teninty Dep. 7).

None of the Depot employees can recall who suggested lashing the two boats together, but it is admitted that they decided to do this and had Depot employees prepare the boats which would be used for a platform.

No mention is made of any request by Cline to have the platform prepared in this manner.

Appellant at page 19, note 16, states that no evidence is in the record relating to the make-up of a platform except the Navy Diving Manual, Exhibit 14. On the contrary the scuba expert, Van Zandt, (Tr. 219-220) states that it is important for the platform to be stationary, and that

anchors have to be provided which will effectuate this need. Furthermore, the platform has to be anchored so that it will drift over the object which is being dived for. McKissick (Tr. 85) testifies that they dropped anchor over the spot where the tanks were thought to be and that the boat then drifted 10-15 feet. There was only one anchor. Van Zandt testified that where wind was blowing, two anchors at least would be required to hold the platform steady, (Tr. 219-220), and that three would be better; the Navy Diving Manual, Exhibit 14, requires "a two-point moor".

2. The Anchor

There was only one anchoring device, and this, at best, was makeshift. It was an eight inch length of pipe with a bottom welded in it, and filled with cable fasteners for weight. (Tr. 72-73; Aragon Dep. p. 10). The original anchor was insufficient to hold the boat so the party

went back into shore and had additional weights put into the piece of pipe. (Tr. 84; Olson Dep. p. 18). The anchor was attached to the boat with an anchor line. (Tr. 38, 73).

There is no question that the Depot provided the boats and the anchor for the diving operation.

The only question is that of the suitability of this equipment; it was provided by the contractee; the contractee's employees controlled the use of the equipment. Was the contractee negligent in this control? The District Court determined that it was.

The platform was a 12 foot boat and a 14 foot boat lashed together to make a single unit. The boats were powered by a single outboard motor, with the highest estimate of its size being 9 horsepower, but estimated by McKissick (the Depot's "expert" outboard operator) at a 4

horsepower motor. The Appellant (page 20 of Brief) asserts that the motor was sufficient and the boats were maneuverable as evidenced by the fact that the equipment approached Giles 3 times in the space of a few minutes.

In fact, McKissick testifies that the maneuverability was cumbersome, slow and clumsy (Tr. 75, 87). The testimony is clear that Giles held Cline up for a period of 8-10 minutes (Tr. 198; Giles Dep. p. 26), and during this time, either because of his own incompetence, or the awkwardness and inadequacy of his equipment, McKissick was unable to get close enough to the men to get a line to them.

3. Safety Line

As is argued by Appellant at page 21, there is a question as to the use of a "safety line". There is one type of safety line which is to be tied to the diver. In addition to this line, though,

another line (also sometimes termed a "safety line") is to be held in the boat and should be ready to throw to the diver. This second type of safety line often has attached to it a ring-buoy though it can simply be knotted. Van Zandt explains the distinction at page 220 of the Transcript:

> "Well, it should have some type of a flotation device, either a ring buoy or life-saving torpedo, or life-saving rope that you can throw. It's a weighted rope."

In other words, there should be several ropes on the diving platform. At least two and preferably three anchors should be provided, and we assume that they would be attached to ropes. The diver should have a "safety line" for tying to him. There should be also some type of a weighted rope for throwing to the diver.

The Appellant's argument that the safety line is to be attached to the diver and not thrown to

him is erroneous. Van Zandt explained that both lines are necessary (Tr. 218-220, 234). The District Court found negligence on the part of the Depot in failing to supply a ring buoy or weighted rope, and this negligence is supported by the evidence. (Tr. 77; Giles Dep. p. 6). The presence of a ring buoy is one of those items which is always required when working around water. A ring buoy is part of the standard equipment on a diving platform, and is not merely used at swimming pools, bathing beaches and on large ships. The Depot employees made sure there were life jackets for the other two men; the ring buoy is fully as standard equipment for such an operation as this was as the life jackets would be.

It is not a situation where the contractee could not anticipate trouble and therefore did not have to take precautions against it. Rather,

the contractee did anticipate difficulty and provided McKissick and Giles with life jackets. The ring buoy or weighted rope is as essential in a boat in an operation such as this as were the life jackets on the boat operator and the spectator on the boat.

The Appellant in one place argues that had Cline had the safety line attached to his body he could have been pulled into the boat (Brief page 21), and then on page 22 argues that even if a ring buoy had been provided it wouldn't have been helpful. This is sheer conjecture, completely unsupported by the evidence, and Appellant makes no effort to tie this argument into the testimony or evidence. The fact that the life jacket and unweighted rope did not come near Giles has no bearing on the question of whether a proper piece of equipment might have been more effective, and whether the failure to

provide this basic item of equipment was negligence on the part of the Appellant.

The record completely supports the District Court in its determination that the Depot was negligent in providing an unsafe and inadequate diving platform, inadequate emergency equipment, no ring buoy or weighted rope, and an inadequate motor. Nothing in the record cited by Appellant establishes that there was no negligence or that these items were adequate.

The Appellant's main argument centers around the fact that Cline was "an expert" and he should have refused to dive if anything was not as it should be. It is established that Cline was merely an amateur. Furthermore, Cline was relying on the Depot to provide the equipment for the dive. They were in charge. Van Zandt said that if a diver is working for someone and "they are telling him where he is to go down"

(Tr. 226), the surface operations are the responsibility of the contractee. This testimony would be sufficient in and of itself for the Court to find that the surface operations were the obligation of the contractee and under its control.

4. The Tenders

Appellant argues at page 23A that it was up to Cline to check into the qualifications of the tenders who were provided for him. Mrs. Cline (Tr. 201) testified that on the way out to the Depot on that day she asked whether there would be anyone to help him, as in the past, and he stated that he thought Mr. Gonzales would be there too. Mr. Gonzales was the person who had helped him the time he worked at the Depot previously. (Teninty Dep. pp. 4-6).

It seems reasonable that when Cline arrived at the scene and found the platform set up, the line being secured, the life jackets put on, and

being advised that these two men were going out with him, Cline felt that Gonzales wasn't available and that a reasonable substitute had been found to assist him.

It was only after the diving started and Giles inquired about the extra weights that Cline could have known that Giles was not experienced in diving.

The Appellant at page 18 states again that Cline complained about the first safety line. This is an erroneous assumption on the part of the Appellant, perhaps because of the statement by Teninty (Dep. p. 7) that Cline asked Harmon for another line, but then adding that he was too far away to hear the conversation. Olson (Dep. pp. 7-8) states that it was Patterson, Teninty, Marshall or McKissick who determined that the first line was not appropriate for a safety line. Harmon (Dep. pp. 11-12) states that he is the

one who determined that another line was needed, and at page 14, states that Cline did not ask for the line.

The Appellant, page 24, surmises that the really significant findings of the District Court are those relating to the rescue. This may be true. However, the Court found negligence in failing to provide proper equipment for the operation which was undertaken. It is impossible to say that the accident would not have occurred had proper equipment been provided, but neither is it possible to say that the negligence of the Depot in providing improper equipment and personnel had nothing to do with the fact that Cline encountered difficulty. For example, had the platform and anchor been positioned properly, it is possible that Cline would have come up much nearer the platform than he did, and the emergency might not have occurred. This is conjecture, it

is true, but so is the argument at pages 21-24 of Appellant's Brief. Appellant does not in any way show that the District Court's findings of negligence in providing inadequate equipment and incompetent personnel is not justified under the facts.

5. Personnel

The negligence of the personnel of the Depot is most apparent during their rescue attempts. At pages 27-33 of its Brief, the Appellant summarizes some of the testimony relating to the rescue. This summary, read with that of the District Court (R. 221-222), indicates the scene. At page 34 of its Brief, the Appellant argues that McKissick acted as a reasonable person would have acted. In its argument, though, the Appellant fails to note that McKissick made the same errors at least twice. When Giles first went in after Cline, McKissick was faced with the

dilemma posed by Appellant on page 34. However, once he started the motor, turned the boat around, and failed to get close enough to the men that Giles could reach the rope he threw, wouldn't a reasonable man have realized that different tactics were necessary on his next try? McKissick, though, did the same thing the second time, this time throwing his life jacket at the men. He threw the life jacket from approximately the same position as before, and into the wind. (Tr. 87). If he was not negligent on his first throw, he surely was on his second.

Furthermore, the Appellant overlooks the fact that while Giles was holding Cline up, and after McKissick had approached them the first time and thrown the lifeline toward them, the boat was drifting away, necessitating another session of starting the motor, turning the boat around, and reapproaching the men. This was

a slow maneuver, and McKissick surely had time to reflect upon his failure on the first pass and determine that the wind was creating difficulty. He had time to work out another plan of action whereby he could use the wind to help him, instead of throwing into the wind. McKissick did not act reasonably, however; he performed his second maneuver exactly as the first one, with the same result. In all, some eight to ten minutes elapsed; there was time for McKissick to rectify his first error, that of throwing into the wind, instead of perpetuating it again.

At page 35 the Appellant points out in a footnote that the propeller of the boat must be considered. It must be remembered that McKissick, while he was being so "reasonable", managed to get one of the ropes (either the anchor or the safety line) caught in the propeller. (Tr. 88, Giles Dep. p. 11).

Appellees submit that the actions of McKissick were not reasonable efforts under the circumstances. It is plausible that on his first attempt he would not realize the importance of approaching from the upwind side, but certainly he should have learned from his abortive first attempt. He did not, and as a consequence, Cline died.

Appellant (footnote No. 20, at page 27) points out that other Depot employees attempted to rescue Cline, and comments on the failure of the District Court to discuss this fact. In fact, these men stood on the bank until Cline had been held up by Giles for 8-10 minutes, and after Cline had disappeared and gone to the bottom, then they attempted to rescue him. (Tr. 12, 94; Harmon Dep. pp. 38-39; Teninty Dep. p. 19). No attempt was made by these men during the time that Cline was on the surface of the water.

Appellant argues that the equipment and personnel were adequate (or that it was up to Cline to object to them if they were not) and that reasonable efforts were made to rescue Cline. Where a contractee provides equipment and personnel to a contractor, the equipment and personnel must be suitable and adequate for the job which is undertaken. The contractee is liable for its negligence to the extent that it has exercised control over the operation.

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Fluor Corporation v. Sykes, 3 Ariz. App. 211, 413 P.2d 270 (1966).

Amacker v. Skelly Oil Co., 132 F.2d 431 (C.A. 5th, 1942), Cert. Den. 322 U.S. 760, 88 L. Ed. 1588, 64 S.C. 1278; Rehearing Den. 323

U.S. 810, 89 L. Ed. 646, 65 S.C. 29, is very closely in point to the case now being considered. In Amacker, an independent contractor was asked to send out two men without foreman and without tools to clean out an oil tank. The contractee, as does the Appellant here, argued that there was no duty on its part, that there was no breach of any duty, that the plaintiff was an independent contractor, that plaintiff was experienced, that he knew the danger, that he should have taken any necessary precautions. The District Court directed a verdict for the defendant, which was reversed on appeal. At page 433, the Court holds:

> "On this record, the defendant had supervision and control over deceased and was under a duty to exercise due care to see that the dangerous work it put him to doing was done by reasonably safe and prudent means and methods, and deceased in going into the tank to do the work required with the tools and equipment and in the way

> provided by the defendant had a right to assume that the defendant had taken adequate precautions, *** we hold that defendant owed a duty to deceased, that there was ample evidence to take the case to the jury on all the issues, ..."

As has been demonstrated, and as is admitted by the employees of the Depot (Olson Dep. pp. 10-11; Harmon Dep. pp. 13-15; Tr. 28, 30, 32-34, 35, 45, 70, 77, 80, 226), McKissick was in charge of the boat, subject to the supervision of and instructions from Teninty, Patterson, Olson and Harmon. The Depot personnel provided all the equipment except the wet suit and scuba gear which Cline borrowed (Tr. 112, 143) from the Sheriff. The Depot provided all the personnel who were to assist in the operation. Cline fits squarely into the holding of the Amacker case, that when a contractor works with the tools and equipment provided by the contractee he has the right to assume that the contractee has taken all

necessary precautions for his safety. This was not done by the Depot; it had a duty which it breached, and Cline died as a result of the breach.

C. The Depot Was Negligent In Its Rescue Attempts

After Cline was found to be "in trouble", various attempts to rescue him were made. These have been discussed factually in the preceding pages, particularly with reference to the incompetence of the personnel who were at hand to assist him on that fateful day.

It is the position of the Appellees that the employees of the Depot had a DUTY to rescue Cline, since their negligence had put him into the predicament he was in, and that their breach of this duty culminated in his death; that Appellant should be held liable for its breach in this

regard.

The Depot personnel were not volunteers as is argued by the Appellant at page 25 of its Brief. The Depot had provided the men and equipment for the operation and had the duty to protect Cline from any defects in the equipment or negligence of its employees. The negligence of the personnel has been established. They did not work "reasonably" with the equipment which was at hand. Thus, even under the Good Samaritan Doctrine, which Appellant attempts to discount, the Depot is liable.

At page 26 the Appellant states that it can "pass by the Good Samaritan doctrine for the Court has failed to find that as a result of the Government's alleged negligence Cline's position was worsened." Whether or not there was a finding on this point, the testimony was that the persons on the shore were under the impression

that there was no need for them to go to Cline's rescue because the boat was there to rescue him (Tr. 57). As to worsening his condition, both Patterson and Mrs. Cline felt that they would have been able to rescue him, and were deterred by the fact that another, supposedly more efficient means, was at hand in that a boat was maneuvering toward him. (Tr. 196-197, 53).

Appellant attempts to establish that Cline should be precluded from recovering even if the Appellant was negligent for the reason that Cline was contributorily negligent.

The bases of contributory negligence are two: Cline's failure to wear the lifeline and the fact that Appellant asserts that Cline should have stopped the operation if the men and equipment were not adequate.

As to the first, Van Zandt testified that wearing a lifeline while working in a circular

pattern "would be almost impossible ... of course the life line would become entangled in the weeds. It wouldn't allow you to make a circular pattern ... and you would be dragging the added weight of the weeds along behind you ... would be like swimming with a weight attached to you." (Tr. 224).

The Appellant's expert witness, Thrailkill, testified after Van Zandt (Tr. 236-242) and did nothing to refute this testimony. Thrailkill testified that, as a general rule, a safety line was necessary. (Tr. 238). He was not asked any questions regarding the use of a safety line in weed infested waters.

Appellant argues that Van Zandt's testimony in this regard should not be considered because Cline made semi-circular passes (as distinguished from circular) and that there was no need for Cline to make circular or semi-circular

passes. The type of passes which would be required by this job is not a matter which is in testimony, and Appellant does not give reference as to the basis for its statement that "there was no need for Cline to make circular passes in searching for the tanks".

The fact is that Cline did make circular (Teninty Dep. p. 14, Harmon Dep. p. 26) or fishhook type passes (Tr. 49, Olson Dep. p. 16), and a lifeline was detrimental to his welfare if he wore it in passes of this type (Tr. 224). It was not negligence on the part of Cline to refuse to wear the lifeline when it would have been more dangerous to him to wear it.

The Appellant argues that it was negligence for Cline to dive without a "buddy" diver. The general rules are that this is a recognized procedure; however, there were numerous people standing on shore, and two men in the boat. It

is reasonable for Cline to feel that under circumstances where there are numerous bystanders, a diving "buddy" would not be necessary.

The District Court determined that Cline was not negligent in refusing to dive because experienced divers and more adequate equipment were not made available for him; he was not negligent in not diving with a buddy; he was not negligent in relying on the Depot to rescue him after the employees of the Appellant were cognizant of his distress.

The Appellant asserts that Cline's negligence bars recovery. Under the Last Clear Chance Doctrine, which is applicable in Arizona, the possibility of negligence on the part of Cline is immaterial if his negligence had come to rest and defendant thereafter had the last clear chance to avoid injuring him by the exercise of reasonable care and failed to do so. Odekirk v. Austin,

90 Ariz. 97, 102, 366 P.2d 80 (1961); Trauscht v. Lamb, 77 Ariz. 276, 280-281, 270 P.2d 1071 (1954); Casey v. Marshall, 64 Ariz. 232, 237, 168 P.2d 240 (1946). This doctrine was considered by the Trial Court (R. 230).

D. Summary On Question Of Negligence

Appellant has argued the facts of the case at length, asserting that the Trial Court made an erroneous decision on the facts as to the question of negligence. Because most of the Court's Findings of Fact were questioned by this manner of presentation, the Appellees have given Transcript and Deposition testimony upon which the Trial Court could base its Findings.

This case was tried upon personal testimony, supported by depositions of some unavailable witnesses. Of the oral testimony

before the Court, Patterson, McKissick and Mrs. Cline were witnesses to the tragedy. Other witnesses of the circumstances by which Cline drowned testified through depositions.

The principles relating to the presumptions of, and inferences attributable to, findings of a Trial Court upon an appeal are numerous. It is settled that, in non-jury cases, the determination of the credibility of witnesses is a function peculiarly and properly for the Trial Court and his decision is not disturbed on appeal. Ruth v. Utah Construction Co., 344 F.2d 952 (C.A. 10th, 1965); Olympic Finance Co. v. Thyret, 337 F.2d 62, 68 (C.A. 9th, 1964); Costello v. Fazio, 256 F.2d 903, 908 (C.A. 9th, 1958); Tonkoff v. Barr, 245 F.2d 742, 750 (C.A. 9th, 1957); Wilbur Security Company v. Commissioner of Internal Revenue, 279 F.2d 657, 659 (C.A. 9th, 1960).

In fact, this Court has held that the decision

of the Trial Court will be upheld when it is shown that its decision is based upon the testimony of only one witness, even though other testimony contradicts this witness. Caddy-Imler Creations, Inc. v. Caddy, 299 F.2d 79, 82 (C.A. 9th, 1962).

Much of the important testimony in this case was from witnesses who testified before the Trial Court. The credibility of the witnesses was determined by the Trial Court and his determination of the facts in this matter reflect his decision as to their credibility.

One of the most settled practices in our court systems is that a decision of the Trial Court on questions of fact will not be overruled on appeal, unless a very substantial argument is made to the Appellate Court by the Appellant.

This theory of law was codified in Rule 52(a) F.R.C.P., which provides:

> "... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses..."

Another basic premise in appellate procedure is that if two or more inferences can be made from the evidence, the Appellate Court must take the view of the evidence which is most favorable to the appellee. The Ninth Circuit has uniformly held that the decision of the Trial Court will be reversed only if that decision is "clearly erroneous" and is not supported by evidence. Tonkoff v. Barr, supra.; Wilbur Security Company v. Commissioner of Internal Revenue, supra; Hayden v. Chalfant Press, Inc., 281 F.2d 543, 547 (C.A. 9th, 1960); Lundgren v. Freeman, 307 F.2d 104, 113-115 (C.A. 9th, 1962); Teren v. Howard, 322 F.2d 949, 952 (C.A. 9th, 1963); Williams v. Kaag Manufacturers. Inc.. 338 F.2d 949 (C.A. 9th, 1964);

Stauffer Laboratories, Inc. v. Federal Trade Commission, 343 F.2d 75 (C.A. 9th, 1965); Bonneville Locks Towing Co. v. United States, 343 F.2d 790 (C.A. 9th, 1965).

II.

THE DAMAGES ARE NOT EXCESSIVE

A. The Award Is Sufficiently Specific Under Rule 52(a) F.R.C.P.

Appellant asserts at pages 41-47 that the Findings of Fact of the Trial Court are erroneous in that the Findings do not comply with F.R.C.P. 52(a) as to specificity. Particularly objectionable to the Appellant is the fact that the District Court found that Cline would have earned an average of $24,000 a year over his life time. Appellees assert that sufficient basis for this decision is in the record and that the determination

of the Trial Court is as specific as is possible on this item.

Duane Hagadone, the President of the newspaper chain which employed Cline, testified (Tr. 154-155) to Cline's financial prospects. Hagadone testified (Tr. 154) that in two or three years Cline would have been making $20,000 or more, and that would increase substantially as time went by, at least up to $30,000 (Tr. 155). On cross-examination, Mr. Hagadone testified (Tr. 156) that the present publisher, who works part-time, makes $30,000 and would make more if he had not turned over part of his normal load to an assistant.

Mr. Hagadone's testimony regarding Mr. Cline's income possibilities and job security was verified by Cline's father (Tr. 170). The Appellant has pointed to no testimony which would indicate that these income levels would not be

reached by Cline. Appellant has only argued that the District Court reached a conclusion of $24,000 without supporting his decision by evidentiary findings. Appellees submit that the Trial Court had to begin somewhere in its calculation of damages, and that the determination of an average annual income of $24,000 is supported by the evidence and is sufficiently specific that it can be reviewed on appeal. The Appellant cites cases that held that findings of fact must be specific enough that the decision can be reviewed on appeal. Appellees submit that these cases would possibly apply had the District Court determined only that the plaintiffs would recover the sum of $389,390.15 without showing the calculations for present value and cost of maintenance.

> "Neither may the court now be put in error for its failure to reveal the method employed in calculating the amount

of damages awarded, for the method of assessing unliquidated damages in any case is not required to be revealed by a trier of the facts, either court or jury. In such cases the court's informed opinion and best estimate of the damages is reflected in his award ..." Ginsberg v. Royal Ins. Co., 179 F.2d 152, 153 (C.A. 5th, 1950).

For other cases, in addition to those cited by the Appellant, which hold that the computation of the damages does not have to be included in the Findings of Fact in order to comply with F.R.C.P. 52(a), see: Robey v. Sun Record Co., 242 F.2d 684 (C.A. 5th, 1957); Chesser v. United States, 295 F.2d 310 (C.A. 7th, 1961); O'Toole v. United States, 242 F.2d 308 (C.A. 3rd, 1957).

B. Income Tax Question

In order to buttress its argument that the judgment of the Trial Court was erroneous due to excessiveness, the Appellant raises the question of whether income taxes should be considered.

Appellant argues at length on its theory that the District Court committed error in failing to make a deduction from gross earnings for federal income taxes. It is the contention of the Appellees that this argument must fail for three reasons, all as will be more fully discussed herein. First, the question of the deduction of income tax was not presented by the Appellant to the Trial Court for its determination; second, the attorney for the government entered into a stipulation at the time of trial as to damages should the Court find liability; third, the deduction of income tax from a wrongful death award is not the law in Arizona. For the first two reasons, the Appellant should be precluded from arguing that a deduction can be made at this time for income taxes; for the third reason, this Court should refuse to resubmit this case to the District Court as requested by the Appellant.

1. The Theory That Income Taxes Should Be Deducted From The Award Is Raised For The First Time On Appeal

At no time during the trial of this matter or in the memoranda presented to the District Judge was there any argument or question raised regarding a deduction for income taxes. The matter was not submitted to the Trial Court in any form or aspect. Upon reading the Appellant's Appeal Brief we find that Appellant has spent ten pages arguing that the Court of Appeals should determine that the question of damages should be remanded to the District Court for deduction of estimated income taxes.

This Court has consistently held that if a question is not briefed in or considered by the District Court then the Court of Appeals will not consider it at the time of the appeal. See Hoffman v. Halden, 268 F.2d 280, 285 and 303 (C.A.

9th, 1959); United States v. Price-McNemar Construction Company, 320 F.2d 663, 666 (C.A. 9th, 1963); Pacific Queen Fisheries v. Symes, 307 F.2d 700, 719-720 (C.A. 9th, 1962).

In the case of Partenweederei, MS Belgrano v. Weigel, 313 F.2d 423, 425 (1962), this Court stated:

> "It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom, and it prevents a litigent from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below. We find here no persuasive reason for making an exception."

Appellant has shown no persuasive reason for making an exception in the case now before

the Court. In fact, Appellant does not even acknowledge that this matter was not presented previously and gives no reason for initiating this argument at this time. Appellees submit that the question of the propriety of the deduction of income taxes was not raised timely and cannot now be pursued by the Appellant.

2. Appellant Stipulated As To The Method Of Ascertaining Damages

At the time of the trial, the attorney for the Appellant stipulated as to the method of computation of the award in the event negligence was found, including the percentage of deduction to be made from such gross amount as the Court might determine to be payable to the Appellees. The stipulation is found at pages 159-160 of the Transcript, commencing at line No. 9 on page 159:

> "MR. WALL: Your Honor, the attorney for the defendant and ourselves

have stipulated on an actuarial figure on the life expectancy, and this is based on the mortality tables, and it takes the Commissioner's 1958 Standard Ordinary Table, and it gives the life expectancy at the time of Mr. Cline's death of 42.16 years.

"Further, Your Honor, in an effort to shorten the trial we have stipulated, upon information from Mr. Charles Bentzin, an actuary in Phoenix, that it would require over that 42.16 years, to repay income at the rate of $500 per month, it would require a present investment of $121,684.42. And it is further stipulated to reduce this amount by 20 per cent, considering the cost of support of the decedent.

"Now, we do this in this regard, Your Honor. This would be in figures of $500 multiples. So of course, leaving it to the Court's discretion, if the Court found an average annual income of $1,000 a month they would multiply that figure times two, or corresponding, whatever the Court finds.

"MR. GORMLEY: That is stipulated to, as far as the Government is concerned, Your Honor.

"THE COURT: Thank you...."

The stipulation was one which included a life

expectancy of 42.16 years, a present investment of $121,684.42 for each $500 per month increment of anticipated income, and a deduction of 20% from the gross figure which would be determined from the use of the foregoing figures. No evidence was given, nor was any attempt made by Appellant to have any introduced, on the amount of taxes which might be assessed upon the future earnings of the decedent.

The cases which are cited by the Appellant supporting its contention that income taxes should be deducted involved either an unsuccessful attempt on the part of the defendant to introduce evidence relating to income taxes at the time of trial or the acceptance of such testimony and a deduction for income taxes which has been accepted on the appeal. None of the cases cited discuss a situation where there is a stipulation by the defendant as to the amount of deduction

which was to be applied to the gross amount which the Court or jury determined would have been earned by the decedent during his lifetime.

> "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced. Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261, 263, 26 L.Ed. 539, 541. The exercise of this power in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials. Liverpool, N.Y. & P.S.S. Co. v. Emigration Comrs., 113 U.S. 33, 37, 28 L.Ed. 899, 900, 5 S. Ct. 352." Best v. District of Columbia, 291 U.S. 411, 415, 78 L.Ed. 882, 885 (1933).

The Court of Appeals of the Third Circuit had occasion to consider a stipulation similar to the one at bar in Morse Boulger Destructor Company v. Camden Fibre Mills, 239 F. 2d 382 (C.A. 3rd, 1956). The case involved a suit for the purchase price, with a verdict to be in that amount, and the jury to determine only the amount recoverable on the defendant's counterclaim. The

plaintiff subsequently sought to amend the judgment to include an amount for interest. The Court of Appeals held that since the judgment rendered was in literal accord with the stipulation, it was binding on the parties to it and binding on the Court, stating (page 383):

> "Since the latter specified the amount of the judgment to be entered, interest for the period prior to judgment would have had to have been included in the amount so specified if it was intended to be included in the judgment stipulated for. It is thus clear that the stipulation excluded such interest."

The stipulation which was entered into in the case now before the Court specifically detailed the method by which an award would be determined. The Trial Judge had to find negligence and then had to make a finding of fact of the estimated average income which Mr. Cline would have received on a monthly or yearly basis over his life expectancy. After arriving at these

findings, the stipulation would come into effect with the parties having agreed to the method of determination. There was a twenty per cent deduction. The defendant stipulated to this deduction and did not make any request for any additional deduction for federal income taxes. The Appellant is bound by its stipulation, as indicated by the following cases: Los Angeles Shipbuilding & Drydock Corporation v. United States, 289 F.2d 222, 232 (C.A. 9th, 1961); Russell v. United States, 288 F.2d 520, 525 (C.A. 9th, 1961); Pacific Queen Fisheries v. Symes, supra.; Masuda v. Kawasaki Dockyard Company, 328 F.2d 662, 665-666 (C.A. 9th, 1964); Schlemmer v. Provident Life & Accident Insurance Company, 349 F.2d 682, 684 (C.A. 9th, 1965); Diapulse Corporation of America v. Birtcher Corporation, 362 F.2d 736, 744 (C.A. 2nd, 1966); Ruderman v. United States, 355 F.2d

995 (C.A. 2nd, 1966); Osborne v. United States, 351 F.2d 111, 120 (C.A. 8th, 1965). See also Cyclopedia of Federal Procedure, by Poore and Keeber, Volume 13, 1966 edition, Section 59.40; Federal Practice & Procedure, by Barron and Holtzoff, Rules Edition, Volume 2B, Page 501, Sec. 1127.

Since the Appellant stipulated as to the amount of the deduction which should be made from the gross award, it cannot now be heard to argue that the District Court should have deducted an additional amount as an estimate of the income taxes which might have been incurred.

3. The Deduction Of Income Tax From A Wrongful Death Award Is Improper Under Arizona Law

The Brief submitted by the Appellant covers all of the more recent Federal Court cases which apply or refuse to apply the income tax deduction.

However, the Appellant indicates that the trend is to require an income tax deduction. Appellees differ with this interpretation of the law in this area. Admittedly, a minority of the jurisdictions do support Appellant's contention that an income tax deduction can be made, but not all in this minority require such a deduction. Furthermore, the rule seems clear that the Trial Court must have some discretion in determining whether the earnings involved are such that the income tax consequences are considerable.

The Appellant begins its discussion of the question of income taxes with the statement that "It would be idle to pretend that the Court's failure to take federal income taxes into account is without judicial support..." In fact, the majority rule is that the income tax deduction need not be made, and furthermore, it would seem that it is not appropriate for the Court to take the

initiative in making this deduction but that it was incumbent upon the Appellant to present this question and to give the Court some basis upon which to estimate the taxes if in fact the Appellant considered this a major factor to be considered in the case.

At page 48 of its Brief, the Appellant mentions that the Second Circuit permitted a deduction for federal income taxes in the case of O'Connor v. United States, 269 F.2d 578 (1958), and then summarized the later case of McWeeney v. New York, New Haven, Hartford RR Co., 282 F.2d 34 (1960). The McWeeney case explained that the decision in O'Connor was necessitated because the Oklahoma case law, which was binding on the Court in O'Connor, specifically required the deduction. The Court in McWeeney establishes two tests: the first is the one mentioned by the Appellant, namely, that no deduction

should be made if the earnings being considered were not above the middle reach of the income scale. The second test is that of the application of state law. At page 39 of its opinion, the Court stated:

> "We continue to adhere to Stokes where the question is one of federal law or the applicable state law is silent, ..."

Further, in Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 315 (C.A. 2nd, 1964), the same court stated that McWeeney had overruled O'Connor "as to any implication in the O'Connor reasoning that tax deductions were not too speculative to be considered in assessing damages."

The Cunningham case held that the New York state law (which was the applicable state law) did not approach "the clear directive the O'Connor court discerned in the state law of Oklahoma that it had to apply" and determined that a deduction for income taxes was reversible error.

The Montellier case (Montellier v. United States, 315 F.2d 180, (C.A. 2nd, 1963) was decided prior to the Cunningham decision. The Court in that case based its determination upon the first "test" established by McWeeney, that of whether the potential earnings were "above the middle reach of the income scale".

The Second Circuit which originated the line of cases with the Stokes decision (Stokes v. United Airlines, 144 F.2d 82, 1944) has, subsequent to that landmark case, eroded into some of the principles established in Stokes. Other jurisdictions, though, have continued to rely upon the Stokes decision as their mainstay, and do so to the present time.

The Second Circuit has not, contrary to the intimations of the Appellant herein, determined that a deduction for federal income taxes is required in cases where earnings would be in

excess of $16,000 annually.

LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (1965), does include the quotation contained on page 50 of Appellant's Brief; however, just previous to the quoted passage the Court states (at page 276):

> "Whether or not the district court was required to allow for the effect of income taxes in this case, we think that it was at least a proper exercise of its discretion to do so."

This is a far cry from requiring the deduction. The Court merely held that this case was one which might be above the "middle reach of the income scale" established in McWeeney and that it was not an abuse of discretion for the Trial Court to make the deduction.

The Court in LeRoy affirms the second test of McWeeney, as follows:

> "... where federal law controls or applicable state law is silent, income taxes should not be considered in

estimating future net income. The rule applies to both jury and non-jury trials."

The most recent case in this series of Second Circuit cases is Petition of Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (1966), cited at page 50 of Appellant's Brief. It appears that the Appellant was still discussing the LeRoy case in its summary of the Marina Mercante case, for the latter case involved incomes of $11,000-$11,500, $9,300-$10,500, and $11,000-$11,500, rather than the $16,000 and $25,000 figures mentioned by Appellant. Further, the Court held that deductions for federal income taxes in Marina Mercante were improper, stating, at page 126:

"...Death cases, where the deprivation of earnings is certain, would seem particularly poor candidates for extending the deduction.

"We therefore direct that the decree be modified by increasing the awards in

paragraphs 3, 4 and 5 to restore the sums deducted for taxes on future income..."

The Second Circuit, then, has not required deductions for income taxes except where it has interpreted the applicable state law as requiring such deductions. It has approved such deductions where the income is "above the middle reach of the income scale". This line of cases hardly seems to be authority for requiring a deduction in the case presently before the Court.

Appellees concur with the statement by Appellant that the other Circuits do not hold consistently one way or the other on this question.

In fact, Cox v. Northwest Airlines, Inc., 379 F.2d 893 (C.A. 7th, 1967), determined that taxes should be computed only on the earnings which would be earned by the decedent after 1979. It applied the McWeeney rule as to the earnings which would be made prior to 1979, determining

that they would not be so substantial as to require an income tax deduction prior to that time. Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F.2d 302 (C.A. 7th, 1951), refused to reverse on the income tax question, and went ahead and determined another basis for its reversal.

At page 51 of its Brief, the Appellant quotes from United States v. Sommers, 351 F.2d 354 (C.A. 10th, 1965). Appellees would like to call the attention of the Court to the sentence which is indicated by the second series of three dots in that quotation:

> "It is a determination best left to the exercise of sound discretion of the trial Judge, whether with or without a jury."

Appellees maintain that this omitted sentence is the key to the remainder of the quotation and that nothing in the Appellant's Brief indicates any abuse of discretion on the part of the Trial Judge

in the case under consideration by this Court.

The Appellate Court in the Sommers case did uphold the action of the District Court in deducting for federal income taxes. It was not a situation where the Appellate Court required such a deduction. It was a situation wherein the error claimed was not enough to require a reversal. At page 360, the Court states:

> "Ordinarily, the award of damages in wrongful death cases is within the discretion of the trial Judge. Such awards are not subject to accurate mathematical calculations. They will be sustained on appeal unless so grossly excessive or inadequate as to constitute clear error ..."

The Appellant discusses the Arizona case of Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034, and points out that this case involved a jury instruction, stating that such an instruction could be misconstrued by a jury. The distinction between a jury case and a non-jury situation

was discussed in Petition of Marina Mercante Nicaraguense, supra., p. 125, as follows:

> "Although the exact issue in McWeeney was whether a jury should be instructed to make a deduction for income taxes and the opinion relief in part on the difficulties jurors would encounter in doing this, the decision was not so limited. Indeed, as the foregoing summary makes evident, most of the reasons given for the rule there adopted are equally pertinent when the award is by a judge--perhaps even more so since the judge attempts accurate calculations whereas 'we know full well that the give and take of the jury room is in round figures and does not deal in actuarial tables, decimal points and percentages.'"

The presence or absence of a jury will not change the underlying theory of the law. The Arizona Superior Court held in Mitchell v. Emblade that "the incident of income tax has no part" in the correct measure of damages. The rule has not been changed; Arizona has specifically held that an income tax deduction is not appropriate in determining the amount of damages

which might be recoverable.

This Court correctly applied this law in United States v. Becker, 378 F.2d 319. Under the McWeeney case and others which have relied upon that case, the federal courts are bound to apply the state law in this matter if the question has been decided in the state. Arizona has determined that, under its wrongful death statute, a deduction for federal income tax is not proper; the decision in the Becker case was correct; the measure of damages is determined by the law of Arizona, the place where the claim arose, and this measure does not include a deduction for income taxes.

The Appellant (at page 54) urges "the Court to re-examine the Mitchell case, particularly in the light of its later Furumizo decision..." The Mitchell case was a decision of the Arizona Supreme Court and was not a decision of the Court

of Appeals. The Furumizo decision of this Court has no bearing on the Arizona law as expressed in the Mitchell case. The Mitchell case is still the law in Arizona.

The Furumizo decision (United States v. Furumizo, 381 F.2d 965, 1967), involves an interpretation of the law of the State of Hawaii, the statute referring specifically to "pecuniary injury". This Court in Furumizo did not say that a deduction was required; the statement was that the fact could be taken into consideration, and that it might not have been error had the Trial Court refused to consider the deduction.

The Appellant compares the Arizona statute to those of Nevada and Hawaii. There is one major difference -- the case law of Arizona specifically states that income taxes are not a consideration in the determination of damages for wrongful death. Furthermore, the recent

Arizona cases have held that "pecuniary damages" are no longer the test.

> "No longer is the life of a working man who is devoted to his family, who gives of himself, of his guidance and his love to that family, reckoned in terms of the net estate which he might leave behind." Fulton v. Johannsen, 3 Ariz. App. 562, 567, 416 P.2d 983 (1966). (emphasis supplied)

In connection with the turning away from "pecuniary damages" and "net estate" as measures of damages in Arizona, see also Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Southern Pacific Company v. Barnes, 3 Ariz. App. 483, 415 P.2d 579 (1966). The applicable portion of the Arizona statute (A.R.S. 12-613) reads as follows:

> "In an action for wrongful death, the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default..."

The Appellees submit that under Arizona law, and the authority of the Becker case, the federal income tax which might be assessed against the judgment in another jurisdiction, under its laws, cannot be deducted from the judgment entered by the Trial Court herein. The Appellant has not justified sufficiently its argument that the Court here should overrule its Becker decision. The Nancy Brooks v. United States case (273 F. Supp. 619, 1967) is not persuasive. The Court there specifically found no state law in the area. That is not the case before the Court where there is ample state authority to support the Trial Court in not deducting for the possibility of federal income taxes.

SUMMARY AND CONCLUSION

It must be noted that Appellant does not raise any argument that the Trial Court misapplied the

law to its Findings of Fact, but only argues that the evidence is conflicting and does not support the judgment; that the award is excessive and estimated income tax should have been deducted.

Appellant's argument on the reduction of the award by reason of taxes, even though first raised on appeal, is clearly erroneous under the applicable law dealing with wrongful death awards in Arizona. No argument is made, nor authorities cited, on the question of excessive damages.

Not one of the Trial Court's findings is totally unsupported by the evidence. While Appellant may disagree with those findings, there must be some stronger basis for reversal of a Finding of Fact than a mere difference of opinion.

This Court has held that it will not reweigh conflicting evidence, and that it will in fact consider evidence in the way that most favors the winning party below. Bonneville Locks Towing

Co. v. United States, 343 F.2d 790 (C.A. 9th, 1965).

> "If conflicting inferences may be drawn from the established facts by reasonable men, an appellate court cannot substitute its own judgment for that of the trial court." Teren v. Howard, 322 F.2d 949, 952 (C.A. 9th, 1963), citing Lundgren v. Freeman, 307 F.2d 104, 113 (C.A. 9th, 1962).

> "It is an elementary principle of law that when a verdict is attacked as being unsupported, the power of this appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact below. When two or more inferences can reasonably be deducted from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. The rule is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." Wilbur Security Company v. Commissioner of Internal Revenue, 279 F.2d 657 (C.A. 9th, 1960).

Based upon the argument and cases cited herein, the Trial Court determined the Findings of Fact as supported by substantial evidence,

correctly applied the applicable law thereto, and its Judgment should be affirmed.

Respectfully submitted this 12th day of August, 1968.

MANGUM, WALL AND STOOPS

By H. K. Mangum

H. K. Mangum
201 Arizona Bank Building
Flagstaff, Arizona 86001
Attorneys for Appellees

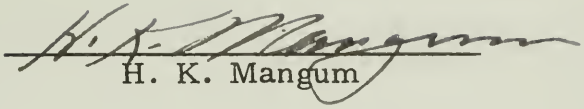
H. K. Mangum
Douglas J. Wall
Richard K. Mangum
Daniel J. Stoops
Joyce O. Mangum

CERTIFICATE AND AFFIDAVIT

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, effective September 1, 1967, and also Rules 28, 30, 31 and 32 of the Federal Rules of Appellate Procedure for the United States Court of Appeals, effective July 1, 1968, and that, in my opinion, the foregoing Brief is in full compliance with these Rules.

I further certify, in compliance with Rule 18 of the September 1, 1967, Rules, and Rule 31 of the July 1, 1968, Rules, that I have caused to be served upon the Attorney for Appellant, three copies of the foregoing Brief, by depositing the same, postage prepaid, addressed to the said attorney, in the United States Mails at the Post Office, Flagstaff, Arizona, on this 17th

day of August, 1968.



H. K. Mangum

No. 22,725

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF OF THE APPELLANT

EDWIN L. WEISL, JR.
Assistant Attorney General

CARL EARDLEY
First Assistant, Civil Division

EDWARD E. DAVIS,
United States Attorney

Department of Justice,
Washington, D. C. 20530.

INDEX

Authorities

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I

The Evidence Shows that Cline's Death was Due in Whole or in Part to His Own Negligence.

A basic conflict in this case results from appellees' insistence that Cline was a neophyte who was unwittingly led to his death by a careless employer. In support of this thesis they cite Fluor v. Sykes, 413 P. 2d 270 (Ariz.), and Amacker v. Skelly Oil Co., 132 F. 2d 431 (C.A. 5). Two more inapposite cases could hardly be found. In each instance the

employer was knowledgeable and experienced in the field in which the employee was working, retained control of the operation, and was held liable for negligence in exercising that control.[1/]

In the case before this Court the Depot personnel, as might be expected in a small Arizona town, were inexperienced and without any knowledge of the problems and hazards connected with scuba diving except for the fact that Patterson understood that divers wore safety lines.

Nor did the Depot personnel represent to Cline that they were experienced in scuba diving techniques. On the contrary the record is clear that Cline was hired because of his expertise, and that the Depot personnel necessarily gave him a free hand to do as he wished. As McKissick testified, "He (Cline) was a skin diver and I thought he knowed what he was doing. . ." (Tr. 82.)

As for Cline himself the record is clear that he was an experienced scuba diver -- had organized the scuba diving unit

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1/ An interesting case is Schweitzer v. Gilmore, 251 F. 2d 171 (C.A. 2, 1958). A guest at a mountain resort was sunbathing on a raft, when it came loose and floated out into the lake. He tried to swim ashore, and, although apparently a proficient swimmer, drowned. The estate brought an action charging that the resort was negligent in having failed to provide any life saving equipment, floatlines, guards or lifeboats. Judgment was for the defendant, the jury finding that the resort was not guilty of negligence, as contended.

Also see Eutsler v. United States, 376 F. 2d 634 (C.A. 10, 1967) where suit was filed against the United States for the death of an employee of the Hercules Co. killed in an explosion. The Court held that although the United States had undertaken to administer a safety program, control of the plant and the employee was in Hercules, and the United States was not liable.

for the Sheriff, represented himself to be qualified, and hired himself out for scuba diving jobs. He was not an ignorant employee relying for his protection upon an experienced employer. He was an independent contractor doing a job requiring expertise in his own way.[2/] The only advice given to him by the Depot -- to wear a safety line -- was rejected. Under these circumstances it is highly illogical for appellees to complain of inadequacies in equipment or personnel. For if these factors, or any one of them, constituted a hazard to Cline, he and he alone had sufficient know-how to recognize the danger, and to take any necessary precautions.

Even appellees' expert, Van Zandt, testified that the diver makes the determination as to the adequacy of the equipment and personnel. He said (Tr. 234):

> Q: Well, in the final analysis, Mr. Van Zandt, it is a correct statement, is it not, if you are a diver you make the determination as to the equipment, the type of equipment, additional personnel or lack of personnel; is that correct, sir? (Emphasis supplied.)
>
> A: Yes.

2/ Appellees state that the Government has not indicated the evidence supporting its statement that Cline was a contractor not an employee (Brief, p. 3). The fact is that the District Court has so found -- indicating its reasons (R. 225, 230). Appellees have not taken exception to this ruling, and it is fully supported by the evidence. (Tr. 26-27, 57-58.)

Affirmatively, appellees concede that Cline did not use a safety line or call for or provide a buddy diver, and as the record shows beyond possibility of contradiction, the use of a safety line and/or a buddy diver are cardinal requirements in any diving operation. Since appellees, of course, cannot deny that had Cline used a lifeline or refused to proceed without a buddy diver, he would not have drowned they seek to excuse the violations. They say that a lifeline was not used because (1) there was a heavy growth of weeds (conceded) and (2) that Cline made circular passes which would have been difficult had a lifeline been attached.[3/] But the point which the appellant made (Brief, p. 39) and which appellees have chosen to ignore is this. Why would Cline have to make circular passes in weed infested waters?

Appellees' expert, Van Zandt, testified that weeds are an extra hazard, that "you have the danger of being entangled in them" (Tr. 233), and that if a circular pattern were followed in weeds the lifeline would become entangled, which would exhaust the diver (Tr. 224). But appellant is not aware of any evidence that a diver must make circular passes -- and reason suggests that there must be many patterns which one can follow in searching for objects on a pond bottom. Reason also suggests that if, as Van Zandt testified, weeds obscure "wires, trees and anything

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3/ Appellant challenges this contention. See opening brief, pp. 39-40.

of that sort", which can entangle, and be "extremely dangerous to the diver" (Tr. 223), the diver should have used every precaution. First, in the absence of a buddy diver to rescue him, were he entrapped on the bottom, he should have used a safety line and avoided circular patterns. Second, had there been some overriding necessity for making circular passes, not disclosed by the record, he should have refused to proceed until a buddy diver could be provided.

In Fluor Corp. v. Sykes, supra, relied upon by appellees, the Court found the following instruction to be a correct statement of the law (p. 276):

> . . . Under our law every person in the management of his own affairs is charged with a duty to use reasonable care for his own safety. Donald Sykes had such a duty and in doing his work he was required to observe all the precautions which would have been used by a reasonable man in like circumstances. The amount of care required depends upon the relative safety of the activity being undertaken. The more danger which is attendant on any given activity, the more care is required. (Emphasis supplied.)

With regard to Cline's failure to call for or provide a buddy diver, appellees' answer is that with so many people on shore, and with two men in the boat a buddy diver wasn't necessary (Brief, p. 41). A response to such a thin explanation hardly seems necessary. A buddy diver is equipped -- he is knowledgeable -- he is trained. And despite the efforts of six men (four on shore) to save Cline, he drowned. That he would

have been saved had an experienced diver been on hand to assist him, by releasing the weights -- and by bringing him up from the bottom if he sank, appellees have not denied. On the need for a buddy diver we can again cite appellees' expert, Van Zandt, who testified that on one occasion he was employed to recover an impeller blade from one of the dams, which had sunk in the Salt River. He stated that he determined that two divers were necessary, that he, not the employer, determined what equipment would be needed, since he, not his employer, was skilled in diving, and that had the employer told him to dive without a buddy diver he would have told him to go fly a kite (Tr. 227-230).[4/]

Thus appellees' own witness, their one expert, made it clear that a diver assumes the responsibility for his own safety by determining the nature and sufficiency of the equipment and personnel needed. Here, Cline made a determination to dive without either a lifeline or a buddy diver, and this decision, we submit, either caused or contributed to his death.[5/] And in

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4/ Plfs. Exh. 16, p. 7 states: "The 'buddy' system should always be used whenever a scuba diver must work without a lifeline or dependable means of communication with surface personnel."

5/ Even appellees concede that the unit divers were instructed to dive only in pairs (Brief, p. 13). The testimony cited by the appellees is worth quoting (Tr. 245):

> Q: (To Mr. Shoemaker) Did you . . . become familiar with safety regulations that were promulgated to members of the diving unit?

Continued on page 7

the State of Arizona, contributory negligence of the slightest degree defeats recovery. Boies v. Cole, 407 P. 2d 917 (Ariz., 1965).

II

The Doctrine of Last Clear Chance Is Not Applicable in the Instant Case. 6/

In view of the circumstances present in this case, noting particularly the fact that the equipment and personnel of which appellees complain, were able to get the boat close to Cline on two occasions, it is appellant's conviction that the only genuine issue in this case revolves about the applicability of the Last Clear Chance doctrine, cited by the District Court, and relied upon by appellees.

5/ (Continuation)

A: Yes sir.

Q: Can you tell me what those were, sir?

A: . . . the main ones were that first off we never made any dive whatsoever during nightime conditions. Another one was that under no circumstances, and nothing was important enough to change this, the way we figured, under no circumstances was any dive to be made by a single person. There was no dive to be made unless you had a crew on top with a diver standing by in case of emergency . . . (Emphasis supplied.)

6/ Although the District Court found that Cline was not negligent, it also found that the Government was liable under the Last Clear Chance doctrine, and this doctrine presupposes the negligence of the injured party.

Appellees in support of their thesis cite several auto accident cases, which, merely state the general rule; and we concede that if a driver, seeing another who has placed himself in a position of peril, has a clear chance of avoiding an accident, he is liable if his lack of prudence causes an accident. Here, we, of course, agree that Cline placed himself in a position of peril, but in the emergency circumstances there was no "clear" chance to save Cline; and a last "clear" chance, not a last "possible" chance is essential. Kerlik v. Jerke, 354 P. 2d 702 (Wash., 1960).

In Roloff v. Bailey, 281 P. 2d 462 (Wash., 1955), a pedestrian was killed by a car which, apparently in an effort to avoid him, skidded 90 feet. Judgment for the defendant was affirmed, and with regard to the Last Clear Chance doctrine the Court said, p. 464:

> Appellant asserts it is possible for respondent to have had an opportunity to avoid a collision by swerving his car to the left . . . It is difficult to imagine a case where a jury could not find that it was possible for a driver to have elected some successful course of action, other than the one that failed. That is not the test of the applicability of the Last Clear Chance doctrine. In Shiels v. Parfeert, 39 Wash. 2d 252, 235 P. 2d 164, we said:
>
> > The quantum of his effort precludes finding that he had a last clear chance to avoid the injury. The nature of the effort can be of any kind that a reasonably prudent man might make. If the quantum of such an effort to avoid an injury is commensurate with the opportunity to do so, the existence of a last clear chance is negatived.

If a driver of an automobile can be excused for making the wrong turn, it seems inescapable that McKissick is entitled to the same consideration. A driver is knowledgeable about the handling of a car. He has passed a test. He has limited choices in an emergency. He can apply the brakes, or turn to right or left or proceed forward. But McKissick was not in the position to fall back upon prior practice and experience. He wasn't faced with an emergency comparable to the many close "shaves" that any automobile driver is likely to encounter. He was confronted with a situation foreign to his experience.

In the final analysis the District Court and appellees have found the Depot responsible for Cline's death because McKissick approached the men in the water from the downwind rather than the windward side.[7/] Like the motorist he should have turned left instead of right. Had McKissick gone the other longer route, and Cline had sank in the interval, without doubt appellees would have contended that McKissick was negligent for failing to proceed directly toward the men in the water. In any event, McKissick was not a ship's master, schooled in handling this type of emergency. Cline, who might have anticipated trouble, made no effort to coach the two men as to their function

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7/ Appellees state that McKissick first threw the rope, and then threw the life jacket, concluding "If he was not negligent on his first throw, he surely was on his second." (Brief, p. 31.) This is a non-sequitur. For even if McKissick were as completely composed as appellees assume he should have been, why should he have concluded that if the wind resisted a rope it would also resist a life jacket?

in the event of an emergency. The record shows that his conversation with Giles and McKissick was limited to Cline's rejection of the safety line, his need for additional weights, the shortage of air in the tanks, the coldness of the water, the manner in which he could slip out of the weights, and his tiredness. (Tr. 77, 81-82, 86, 101-102, Giles Dep., pp. 7, 8, 16, 18.)

The ultimate fact is that McKissick and other Depot personnel made every effort to effect a rescue, as demonstrated by the summary of the evidence in the appellant's opening brief, pp. 27-33; and we respectfully submit that McKissick and the Depot personnel should not be branded as responsible for Cline's death because years later, in the quiet of a courtroom, it is arguable that some other course of conduct might have saved Cline. As the Court in the Baltimore and Ohio RR Co. v. Postom case, cited at p. 36 of our opening brief, aptly stated, "The law makes allowances for the fact that when confronted with a sudden emergency and immediate peril, some people do not think rapidly or clearly and failure to do so does not constitute negligence as a matter of law."

Conclusion

Apart from Cline's negligence manifested by his violation of cardinal diving principles, Cline's death was a tragic accident brought about by an unhappy combination of circumstances --

the weeds which discouraged him from wearing a safety line -- the wind -- the cold water -- Cline's size (he weighed 225-230 pounds) (Harmon Dep., p. 45) -- Cline's failure or inability to release the weights which were dragging him down -- and his terror.[8/] The men present did their best to rescue him. Giles and Patterson almost drowned, and had to be hospitalized. Aragon, too, was taken to the infirmary. Poor McKissick who candidly admitted that his nights are troubled by thoughts of what other course he could or should have pursued -- vainly leaped into the water, when he saw that Cline had disappeared from view. If these facts are proof of negligence -- if McKissick is judicially censured for bringing about the death of Cline, then we can begin to comprehend why men in our modern life hesitate to go to the aid of other men in peril.

8/ Appellees would have us believe that Cline calmly went to his death. They rely principally on the testimony of Cline's wife. Whether two men close together in the water are engaged in a struggle is difficult to discern. But the man who was there - Giles - knew. He testified that Cline was frantic -- and kept dragging him under (Dep., pp. 9-13, 20, 21, 26), a fact borne out by the testimony of Marshall, Tr. 11, Teninty Dep., p. 19, Aragon Dep., p. 12. Giles had no motive to color the facts. He wasn't a Government employee. No one blamed him for Cline's death. And rationally, if Cline were as calm as Mrs. Cline pictured him, why didn't he release the weights which dragged him under -- why didn't he make an effort to swim? When he came to the surface in trouble, helpless -- was he likely to be calm -- or was he likely to be terrified at being unable to save himself. Something was desperately wrong. He may have had a severe cramp or an embolism or some other severe disorder. (See the Navy Manual for all of the afflictions which can plague a diver, pp. 127-177, Plfs. Exh. 14 .) In such a state is he likely to have calmly sank to his death?

III

Income Tax Deductions Should Have Been Made.

In the appellant's opening brief we pointed out the fact that the damage awarded the appellees did not take into account income tax deductions. Appellees respond by arguing:

1. That the issue had not been presented to the trial court, and could not be raised at the appellate level.
2. That the Government had stipulated the damage figure, and was bound thereby.
3. That under Arizona law, the Court is not required to take income tax deductions into account.

With respect to the first contention appellant does not challenge the general rule relied upon by appellees. However, there is a corollary, well stated by the Supreme Court in Hormel v. Helvering, 312 U.S. 552 (1941):

> There may always be exceptional cases or particular circumstances which will prompt a review by the appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below . . . Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts would invariably and under all circumstances decline to consider all questions which have not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

And if the new matter involves an issue of law, and the public interest is involved the appellate court will, if

injustice might otherwise result, consider the new issue. Mulligan v. Andrews, 211 F. 2d 28 (D.C.A., 1954).

Hence, the threshold question for this Court to decide is whether in this case the public interest is involved, and whether injustice might result if the issue is not given consideration. Appellant believes that this question is one of genuine magnitude. In many damage cases involving the Government and private citizens the income tax question must be resolved, and since as we noted in our opening brief the law is not altogether clear this case presents an appropriate vehicle for enunciating the principles which should be applied under the Arizona and like statutes.

With respect to the stipulation, it is before the Court in its entirety, and the Court will note that the agreement explicitly sets forth (1) the decedent's life expectancy (work life expectancy may have been more appropriate), (2) the amount of money needed to return $500 a month for the period of the life expectancy, and (3) the deduction to be made for the support of the decedent (20%). The stipulation doesn't mention income tax, and appellant suggests that this Court should not, by implication, conclude that the Government stipulated away its right to have a deduction made for income taxes.[9/] (This, apart from the fact that Government

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9/ Appellees appear to place great reliance upon Morse Boulger Destructor Co. v. Camden Fibre Mills, 239 F. 2d 382 (C.A. 3). (See Brief, pp. 57-58.) There, defendant had purchased an incinerator from plaintiff, who brought suit upon non-payment.

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counsel is not authorized to give away Government funds.) It is possible, of course, that counsel for both parties overlooked the problem, but if there was any mutual intent to deny the Government the benefit of the deduction it should have been expressly stated, and not left to surmise.

With respect to the law, appellees' principal argument seems to be that even though income tax deductions are proper in some cases there is no requirement that such deductions be made. Appellees appear to rely on several cases cited by appellant:

In LeRoy v. Sabena Belgian World Airlines, 344 F. 2d 266 (C.A. 2, 1965), the decedent's projected income was $16,000 to $25,000, and the District Court made deductions for estimated income taxes. The Court said, p. 276 "Whether or not the District Court was required to allow for the effect of income taxes in this case, we think that it was at least a proper exercise of its discretion to do so . . . Certainly the risk that the federal and New York governments will cease to take a substantial portion of

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9/ (Continuation)
The two parties stipulated that "defendant is indebted to plaintiff in the amount of $6,300, being the price of the incinerator and that the Court may enter a verdict in that amount in favor of the plaintiff. . ." Faced with this express agreement the Court of Appeals ruled that the lower court had been in error in allowing interest on the purchase price. In the case before this Court there was no express agreement about the amount of the judgment.

a $16,000 income is one of the smaller uncertainties involved in the computation in this case, and the 15% figure adopted by Judge Murphy is a reasonable estimate of what that portion would be." Hence, in this case deduction was made, and the Court declined to rule as to whether it had to be made.

In United States v. Sommers, 351 F. 2d 354 (C.A. 10, 1965), the Court in deducting income taxes from substantial projected incomes said, p. 360, "When dealing with such an imprecise and speculative subject, the best that can be hoped for is reasonableness. It is a determination best left to the exercise of the sound discretion of the trial judge, whether with or without a jury." We agree that there must be discretion in the trial court to determine whether income tax deductions would be significant enough to require an accounting; but we do not agree, and the cases do not hold, that if there is an admittedly large income involved, such as in this case, the trial judge can close his eyes to the evident fact that income taxes would be a significant factor.

Furthermore, in the instant case it is plain enough that the judge did not exercise any discretion whatsoever, because the issue was not presented to him by either party. Had he taken into account the prospective income tax payments, but concluded that they were not sufficient in size to require a deduction, then a sharp issue would be presented as to whether he had abused his discretion.

In Petition of Marina Mercante Nicaraguense, S.A., 364 F. 2d 118 (C.A. 2, 1966), the Court adhered to the McWeeney ruling, and concluded that plaintiffs' incomes ranging from $9,300 to $11,500 did not warrant a deduction for income taxes. However, with respect to high incomes the Court said, by way of dictum, p. 125 ". . . in such cases some appropriate deduction should be made."

In brief, we don't know of any case cited by either party in which a court has ruled that it can ignore income tax deductions in high income situations. And we suggest that the discretion relied upon by appellees must relate to a determination as to what a high income situation is. Certainly, by all standards there would be substantial income taxes paid by one earning $24,000 a year.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General

CARL EARDLEY,
First Assistant, Civil Division

EDWARD E. DAVIS,
United States Attorney

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Carl Eardley

CARL EARDLEY
First Assistant, Civil Division,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

CARL EARDLEY, being duly sworn, deposes and says:

That on September 17, 1968, he caused three copies of the foregoing Reply Brief of the Appellant to be served by air mail, postage prepaid, upon counsel for the appellees:

H. K. Mangum, Esquire
Mangum, Christensen & Wall
201 Arizona Bank Building
P. O. Box 10
Flagstaff, Arizona 86001

Carl Eardley

CARL EARDLEY
First Assistant, Civil Division,
Department of Justice,
Washington, D. C. 20530.

Subscribed and sworn to before me this 13th day of September, 1968.

Audrey Anne Crump
Notary Public

My Commission expires August 31, 1971.